Missouri Attorney General's Opinions - 1949

Opinion	Date	Topic	Summary
1-49	May 5	TAXATION AND REVENUE.	Corporate taxpayer receiving authority to file income tax return after due date thereof does not thereby forfeit option to pay tax due in installments.
1-49	May 13	MOTOR VEHICLES. SUSPENSION OF DRIVERS' LICENSES.	Section 8461 R.S.A. Mo., 1939, not repealed by section 5 of Motor Vehicle Safety Responsibility Law, Laws of Missouri, 1945, pages 1207 to 1222 inclusive, and particularly sections 5 thereof, although modified and supplemented thereby.
1-49	July 17	TAXATION AND REVENUE.	The word "taxes" found in the Credit Institutions Tax Act of 1946 includes all governmental impositions by the state or any of its political subdivisions.
1-49	Aug 16	HEALTH AND WELFARE. NARCOTIC DRUG LICENSE.	Applications for a license to sell narcotic drugs are permanent records and cannot be destroyed. Such applications may be microfilmed, that fact certified to the Governor, who may order the original records destroyed.
1-49	Aug 30	HEALTH. HOTELS. LICENSES.	Only hotels of single buildings with ten or more rooms required to be licensed. License fee may not be prorated.
1-49	Sept 9	MOTOR VEHICLES.	Provision for refund of motor vehicle registration fee, found in Section 8369b, Mo. R.S.A., Laws of Missouri, 1947, page 382, is constitutional. Refund applies to all motor vehicles regardless of period for which registered.
1-49	Sept 22	HEALTH.	Division of Health cannot examine records of manufacturers, wholesalers or distributors of carbonic gas to aid in collection of inspection fee on fountain syrups, flavors or extracts.
1-49	Sept 22	MOTOR VEHICLES.	Financial Responsibility Act applies where judgment is in favor of bailor of automobile against bailee who damages same through negligent operation.
1-49	Oct 6	HEALTH. HOTELS. TOURIST CAMP.	Distinction between hotels and tourist camps for inspection purposes.
1-49	Oct 13	NARCOTICS. FOOD AND DRUG.	A drug store or apothecary shop dispensing narcotics must have a registered pharmacist therein before the owner or employer may be granted a state narcotic license. (2) A state narcotic license is not required to buy and sell drugs which contain narcotics in amounts

			equal to or smaller than those stipulated in Section 9839 of the 1939 Revised Statutes of Missouri.
1-49	Oct 14	HEALTH.	Section 9917, R.S. Mo. 1939, is in full force and effect, and it is the duty of the Bureau of Food and Drugs to enforce said section.
1-49	Oct 14	HOTELS. FOOD AND DRUG.	Definition of an apartment hotel and apartment house. First is subject to Sections 9923 to 9954, R. S. Mo. 1939, if the building has ten rooms or more; and the operator furnishes lodging services and retains right of access at all times. Apartment house not subject to hotel regulatory laws, if leased to tenants who have exclusive control of rooms.
1-49	Oct 24	C. F. Adams, M.D.	WITHDRAWN
1-49	Nov 28	FOOD AND DRUG.	Sale, etc. of any drug not branded with adequate directions for the use thereof is misbranding under and a violation of Food and Drug Act.
1-49	Nov 28	TAXATION.	Intangible property tax on property held in trust distributed in county or city of domicile of trustee. Divided when two trustees reside in different counties.
1-49	Dec 6	BUREAU OF FOOD AND DRUGS. HOTEL INSPECTION.	Hotel which has sleeping rooms which do not open to the outside of the building or upon light wells, air-shafts or courts violates Sec. 9940, R.S. Mo. 1939, and a skylight above a hall in which the rooms open would not be an adequate or a legal substitute for a light well or air-shaft.
1-49	Dec 7	LOTTERIES. GAMBLING.	Game of Dartaway is lottery.
1-49	Dec 7	MOTOR VEHICLES.	Safety Responsibility Law applicable to judgments for less than \$1,000.00 for property damages.
1-49	Dec 28	FOOD AND DRUGS. SANITATION REGULATIONS.	The Division of Health of the State of Missouri may not publish a closing order issued by said Division in any newspaper and they may not place a notice or plaque on the door or window of a closed establishment stating that said establishment has been closed for sanitary reasons.
2-49	Dec 9	Hon. Lyon Anderson	WITHDRAWN
3-49	Jan 18	COUNTY SURVEYOR. COUNTY HIGHWAY ENGINEER.	County court is required to furnish county surveyor with such surveying equipment as is necessary for the performance of his official duties. No authority to appoint a county foreman under provisions of Section 8655, Laws, 1945, page 1493.
3-49	Feb 10	COUNTIES. ELECTIONS.	Election called within the county to establish a public county health center under House Bill 280, Laws of Mo. 1945, page 969, must be held at the usual voting places in the county for voting upon county officers.

3-49	Mar 21	Hon. Hugh Atwell	WITHDRAWN
<u>3-49</u>	May 2	SCHOOLS.	Director need not be qualified voter.
3-49	Aug 2	COUNTY COLLECTORS. TAXATION.	Under provisions of House Bill No. 56 of 65th General Assembly, collectors do not receive additional compensation of one-half of one per cent of all current taxes collected on the real estate owned by a utility.
<u>5-49</u>	Feb 4	MOTOR VEHICLES. TAXATION.	Two per cent use tax on motor vehicles must be paid before Missouri title is obtained where person applying for title received motor vehicle as a gift from person who bought vehicle and paid state sales tax on such vehicle in a foreign state, when no Mo. Sales tax has been paid on such motor vehicle.
<u>5-49</u>	Feb 9	CRIMINAL COSTS. MAGISTRATES.	Magistrate fee of \$2.50 (Laws, 1947, Vol. 1, page 488) is a proper charge against the state, county or other person liable therefor. Duty imposed on magistrate to charge, collect and/or account for magistrate fee of \$2.50 provided by Laws 1947, Vol. 1, page 488.
5-49	Feb 23	MAGISTRATES.	Office of extra magistrate may be abolished without regard to term of incumbent.
5-49	Mar 7	TAXATION.	Fruit tree spray and garden spray sold to owners of commercial orchards and truck gardens are "sales at retail" within subparagraph (g) of Section 11407, Laws of Missouri, 1947, Vol. 1, p. 536. Such sprays not within exemption clause contained in Section 11409, Laws of Missouri, 1945, p. 1869, which clause refers to "seed, limestone or fertilizer".
5-49	May 4	TAXATION. MOTOR VEHICLES.	Procedure outlined in House Bill No: 258, Laws of 1947, Vol. II, page 431, for collection of sales tax on motor vehicles not to be applied to trailers and semi-trailers.
5-49	May 6	DUPLICATED OFFICES.	The same person may not at the same time be public administrator in a third class county and also be city attorney for a village within that county because of the incompatibility between the two offices.
5-49	Aug 30	Hon. G. H. Bates	WITHDRAWN
5-49	Nov 9	Hon. Emmett L. Bartram	WITHDRAWN
<u>5-49</u>	Dec 21	TAXATION. SALES TAX.	Invalidity of automobile use tax does not affect remainder of act relative to collection of sales tax on motor vehicles.
9-49	Nov 22	COUNTIES. COUNTY COURT.	The County Court may lease the poor farm under certain circumstances.
10-49	Jan 4	OFFICERS.	Offices of County Collector and County Assessor not incompatible and

			one person may serve as County Assessor and Deputy County Collector at the same time.
10-49	Mar 24	Hon. Paul Boone	WITHDRAWN
10-49	June 10	CORONERS. SHERIFFS.	Fees in connection with coroner's inquests.
10-49	June 24	LIQUOR SEARCH AND SEIZURE. CRIMINAL LAW.	Disposition of proceeds of sale of contraband liquor after payment of fine and costs assessed by the court.
10-49	Oct 24	CRIMINAL LAW.	Services included in term "valuable thing" used in Section 4694, R. S. Mo. 1939.
10-49	Nov 9	TAXATION.	Errors on the tax book for current or previous years taxes may not be corrected by Collector.
10-49	Nov 23	HEDGE FENCES. PROSECUTING ATTORNEY.	(1) Sec. 8578, R.S. Mo. 1939, is not violated merely by permitting a hedge to shade a road. (2) It is discretionary with the prosecuting attorney as to whether he shall institute action upon receipt of complaint by a private citizen regarding a hedge fence which allegedly violates this section.
10-49	Nov 29	RECORDER. MARRIAGE.	Duty of Recorder of Deeds to record marriage certificates.
11-49	Mar 16	FOREST CROP LANDS.	Forest crop lands shall be assessed at \$1.00 per acre as long as classification continues; duties of assessor, county clerk and collector in assessment, levy and collection of taxes.
11-49	June 22	PROSECUTING ATTORNEYS.	Not mandatory upon prosecuting attorney to file criminal information upon filing of complaint. Prosecuting attorney may use his discretion in this matter.
11-49	Dec 30	DIVISION OF HEALTH.	A burial permit is necessary to accompany dead bodies moved out of this state by private conveyance but it is not necessary to have a transit permit to accompany such bodies transported out of this state by a private conveyance.
12-49	Jan 24	WITNESS FEES.	A state witness, testifying as an expert witness, can only claim the ordinary witness fee, and cannot refuse to give testimony because he has not previously been tendered a fee as an expert witness.
12-49	Feb 10	TAXATION.	Soldiers' & Sailors' Civil Relief Act exempts person in military service from personal property taxation, unless residence actually established in Missouri.
12-49	May 9	Hon. Ealum E. Bruffett	WITHDRAWN

12-49	June 30	FORGERY.	An information charging forgery of a check on an individual, drawn on an incorporated bank or trust company, should be filed under Section 4571, Mo. R. S. A. 1939.
13-49	Jan 13	INTOXICATING LIQUOR.	Missouri licensed wholesaler may not sell intoxicating liquor to persons other than licensed retailers.
13-49	Mar 14	LIQUOR CONTROL. APPROPRIATION. REFUND APPROPRIATION.	Appropriation to refund cancelled beer stamps may be paid to assignee of party to whom appropriation is made.
13-49	Mar 16	INTOXICATING LIQUOR.	Permits for the sale of intoxicating liquor by the drink at retail may be issued only in cities containing more than twenty thousand inhabitants according to the last Federal decennial census.
13-49	May 5	TAXATION – SALES TAX.	Federal Excise Taxes and freight charges not deductible from "contract price" in levying tax on motor vehicles under Sales Tax Act.
13-49	July 7	SALES TAX.	Liability for billboard rental.
13-49	July 12	SALES TAX.	Liability for tax upon advertising posters to be shipped outside state depends upon time of passage of title.
13-49	Sept 22	OFFICERS.	Sheriffs charged with duty of arresting persons at request of parole or probation officer. Sheriffs are not entitled to additional compensation for duties performed at request of parole or probation officers.
13-49	Dec 16	SALES TAX. INTERSTATE COMMERCE.	A sale of goods in one state for transportation to another state is not interstate commerce where the agreement itself is to be completed and carried out wholly within the borders of a state; and such transaction is therefore subject to the Missouri Sales Tax Act.
15-49	Mar 31	CONSERVATION COMMISSION. FISH AND GAME.	Farmer and his family not entitled to fish without permit in waters on land leased by said farmer but not residing thereon.
<u>15-49</u>	July 17	STATE HIGHWAY COMMISSION.	Regulations limiting loads required to be filed in office of Secretary of State.
15-49	Sept 26	DIVISION OF WELFARE. PENSIONS.	Legal representative of deceased blind pensioner is entitled to receive payment on pension check previously paid pensioner and to receive payment of accrued pension covering portion of month to pensioner's date of death.
<u>15-49</u>	Oct 16	ROADS AND BRIDGES.	Title to bridge built out of County funds remains in county court.
16-49	Feb 11	SUPREME COURT. FEES.	Marshal of Supreme Court not entitled to retain fees for service of process under Supreme Court Rule No. 5.04.
17-49	June	APPROPRIATIONS.	Appropriation to Department of Corrections may not be used to

	29	STATE MONEY.	purchase household furniture and furnishings for residences owned by State of Missouri. Rent received by State of Missouri upon residences owned by state to be paid to the Department of Corrections for transmittal to the state treasurer.
18-49	Apr 9	Hon. E. Wayne Collinson	WITHDRAWN
18-49	Apr 11	APPROPRIATIONS.	Appropriation for eradication of Bangs disease in cattle may be made out of "The Missouri Postwar Reserve Fund."
18-49	May 25	APPROPRIATIONS. TAXATION. MOTOR FUELS.	Legislature may appropriate money for payment of motor fuel tax refunds when claims are submitted in accordance with Sections 16, 17, and 18, 1943 Laws, pages, 690, 691 and 692.
18-49	Sept 17	COUNTY TREASURERS. TOWNSHIP ORGANIZATION.	Must pay deputy and clerical hire from own compensation.
18-49	Nov 1	MAGISTRATES.	Telephone is necessary equipment in the Office of the Magistrate and is to be paid for by the County.
18-49	Dec 17	TAXATION. EXEMPTIONS.	Church parsonage rented out to private individuals is not exempt from taxation under the provisions of Section 5, Laws of Missouri 1945, p. 1800.
<u>19-49</u>	Mar 23	INSURANCE DEPARTMENT.	May employ actuary-jointly with Public School Retirement System.
19-49	June 9	ADMINISTRATION.	Allowance for claim for tombstone is in second class.
19-49	Oct 19	STATUTES. INITIATIVE. REFERENDUM.	Effective date of act suspended upon filing of referendum petition, and such suspension is not affected by a suit to test propriety of referendum.
20-49	May 13	SWAMP LANDS.	Indemnity Patent No. 33 by State of Missouri dated January 3, 1878, conveying certain described land to Mississippi County, was effective to pass title to such land to Mississippi County.
22-49	Jan 20	MAGISTRATES. COUNTY COURTS. OFFICERS.	Judge of the county court may not serve as clerk of magistrate court.
22-49	May 23	PROBATE COURT. MAGISTRATES.	Clerk of Probate and Magistrate Courts must be over twenty-one years of age.
22-49	July 25	PUBLIC OFFICERS. SHERIFFS. CIRCUIT JUDGES.	Approval by circuit judge of deputy sheriff appointment is discretionally. Mandamus will lie to correct abuse of this discretion.

22-49	Nov 22	MAGISTRATE AND PROBATE COURT FEES.	County is liable to pay clerk's fees in magistrate cases where prosecuting attorney enters nolle prosequi; clerk's fees in probate court in sanity hearings of indigent insane; and attorney's fees for attorney appointed by court to represent indigent insane at hearing. Duty of the Department of Revenue to collect these fees when county court refuses to pay them.
24-49	Jan 7	CRIMINAL CODE. TREASURERS.	Postdated checks fall within the provisions of the Criminal Code, Sec. 4695, R.S. Mo. 1939. County Treasurers may not serve as Deputy Sheriffs.
24-49	Jan 19	COUNTY BUDGET ACT.	County court in counties of the 4th class may estimate tax moneys from all sources in arriving at budget.
24-49	Feb 14	Hon. William Lee Dodd	WITHDRAWN
24-49	Mar 10	HEALTH – RULES. SEWAGE.	Rules of Division of Health concerning sewage systems are valid. Injunction is a proper remedy to prevent a municipality from creating a public nuisance.
24-49	May 12	AUCTIONEERS. COMMUNITY SALES.	Person selling at auction at community sales barn required to have auctioneer's license.
24-49	June 27	BURIAL ASSOCIATIONS. SUBMITTED FORM OF CONTRACT DISCUSSED.	Form of contract submitted is not a policy of insurance on its face.
24-49	July 18	COMPENSATION TO BE PAID PROSECUTING ATTORNEYS UNDER HOUSE BILL NO. 297.	In determining compensation to be paid Prosecuting Attorneys under House Bill No. 297, the proper procedure is to add 25% of the sum provided under Section 12939 plus 25% of the sum provided under Section 9701.
24-49	Oct 31	SCHOOLS. LIBRARY COMMISSION.	State Librarian and employees of Missouri Library Commission not within provisions of H.B. 151, Laws 1945, as amended, setting up Public School Retirement System for teachers.
25-49	Oct 16	HEDGE FENCES.	Sec. 8578, R.S. Mo. 1939, requiring anyone owning a hedge fence along or near the right of way to keep it trimmed to a height of five feet, is valid and enforceable.
27-49	Feb 7	TAXATION.	Corn that has been harvested in personal property and is assessable. Assessors may be removed by order of the county court for failure to perform duties enjoined upon them by law; assessors may be proceeded against for failure to perform duties enjoined upon them by law upon their official bond, by the presiding judge of the county

			court, by the prosecuting attorney, or by an individual acting in his private capacity. Assessors failing to perform the duties of their office may be proceeded against in quo warranto.
27-49	Mar 2	ASSESSORS. TAXATION.	Assessor need not call upon taxpayer to take his list and view property. Duty of taxpayer to deliver completed list to assessor.
27-49	Mar 7	ASSESSOR. TAXATION.	All tangible personal property owned by taxpayer to be assessed in his county of residence.
27-49	May 9	TAXATION. FRANCHISE TAX.	Missouri corporation owning real estate in state in which it has not qualified to do business not entitled to allocate shares and surplus.
27-49	Sept 5	INTERSTATE BRIDGE. TAXATION.	The State of Missouri may tax that portion of an interstate bridge owned by Richardson County, Nebraska, which lies within the state of Missouri.
27-49	Nov 28	LEVEE DISTRICTS. TAXATION.	No appeal lies to State Tax Commission on assessments on formation of county court levee districts.
27-49	Nov 29	Hon. Clarence Evans	WITHDRAWN
27-49	Nov 30	TAX EXEMPT REALTY AND PERSONALTY.	Realty and personalty not strictly devoted to purely charitable purposes is not tax exempt.
28-49	Jan 14	LEGISLATURE.	There is a vacancy at present in the office of Representative from Cape Girardeau County, and Governor should issue writ of election to fill such vacancy.
28-49	Aug 18	COUNTY COURTS. CONSTITUTIONAL LAW.	Associate judges of St. Louis County Court to be elected at general election to be held in 1950. An act found Laws of Mo., 1943, page 509, relating to St. Louis County rendered unconstitutional by adoption of Constitution of Missouri, 1945.
30-49	July 27	CORONERS. DEATH CERTIFICATES.	(1) Jurisdiction of coroners. (2) Proper person to sign death certificates.
30-49	Sept 1	CRIMINAL LAW. MAGISTRATES.	Magistrate has power to issue commitment after stay of execution extending throughout entire period of sentence. Power to issue commitment does not expire with expiration of time of original sentence when execution has been stayed.
31-49	Mar 3	MOTOR VEHICLES.	Stamping of motor number on motor located in State of Missouri, which motor had previously been installed in automobile in state of lowa, the automobile having subsequently been sold to a Missouri dealer, and in turn sold by said dealer to a resident of Missouri not in conflict with Missouri law, and upon showing of proper evidence of assignment by proper authorities in state of lowa of said number to the said motor, and proper evidence of ownership of automobile by present owner, certificate of registration should be issued to said

			owner by Missouri Motor Vehicle Department.
31-49	Mar 7	COUNTY COURTS.	County court does not need to submit plans and specifications for manner of removal of a portion of a county building. The circuit judge of Adair county does not have the power to order an additional ten cent levy over and above the fifty cent levy allowed by law.
31-49	May 6	ROADS AND BRIDGES. COUNTY COURTS.	County court may suspend funds for constructing a road on land occupied by county hospital.
31-49	Sept 15	CRIMINAL LAW. GAMBLING.	When one-ball pinball machine is a gambling device under Section 4678, R. S. Mo. 1939.
32-49	Nov 10	APPROPRIATIONS.	State not obligated to reimburse City of Mount Vernon on sewage disposal plant.
33-49	Jan 7	TAXATION.	Any property owned by a city is exempt from taxation under the authority of the Constitution and under Section 10.942.4 Mo. R.S.A.
33-49	Feb 18	SALE OF COUNTY PROPERTY.	A county court has the power and authority to convey real estate belonging to the county. Such conveyance can be made by the court itself without the appointment of a commissioner.
33-49	Mar 9	TAXATION. REVENUE.	Irrevocable trust created December 30, 1909, subject to provisions of the Collateral Inheritance Tax Law found Laws of 1899, page 328, R. S. Mo. 1909, Section 309.
33-49	Mar 12	WORKMEN'S COMPENSATION. SECOND INJURY FUND.	Every employer must pay \$100 into the Second Injury Fund in every case of total, permanent loss by his employee of the use of each of the human eyes, totaling \$200 for the total, permanent loss of the use of both eyes, even though the loss occurs in the same accident.
33-49	Apr 15	Hon. James Glenn	WITHDRAWN
33-49	Aug 16	SCHOOLS. ELECTIONS.	Election for annexation of school district void where notice posted for fourteen days instead of fifteen days required by statute.
33-49	Sept 8	DIVISION OF WORKMEN'S COMPENSATION.	The Division of Workmen's Compensation may make a nunc pro tunc order of record showing the acceptance by an employer of the workmen's compensation amendment with respect to occupational disease where there has been substantial compliance with subsection (b) of Section 3695, R.S. Mo. 1939.
33-49	Sept 20	LEGISLATURE. LEGISLATIVE RESEARCH COMMITTEE.	Legislative Research Committee of General Assembly cannot delegate to Executive Committee or other sub-committees or director power to employ or discharge staff members or other employees.
33-49	Sept 30	Hon. Spencer H. Givens	WITHDRAWN

33-49	Oct 13	CIRCUIT COURT.	Circuit Judge may hear case in other circuit when requested to do so by judge of that circuit.
33-49	Dec 16	SHERIFFS IN THIRD CLASS COUNTIES.	Sheriff who has been appointed to serve as probation officer in a county of the third class shall be allowed and paid by the county the necessary expenses incurred in delivering girls to the State Industrial Home at Chillicothe, Missouri, and return and the necessary expenses paid on account of said girls.
35-49	Sept 19	PROSECUTING ATTORNEYS.	Prosecuting attorney may sue securities of defaulting county official for monies embezzled by the said official.
35-49	Oct 26	CRIMINAL COSTS.	State not liable for costs of hospitalization of person charged with graded felony who is injured breaking from jail and attempting to escape from county jail.
35-49	Nov 2	CHIROPRACTORS.	When the State Board of Chiropractic Examiners revokes the license of a chiropractor for illegal actions or practices it does open the way for a branch of the state government, i.e. the prosecuting attorney of the county in which the chiropractor resides, to file criminal charges against the aforesaid chiropractor.
35-49	Nov 17	ADMINISTRATIVE LAW AND PROCEDURE. STATE BOARD OF COSMETOLOGY.	Rule of the State Board of Cosmetology requiring a holder of a Missouri license to pay a fee of \$5.00 for certification in order to become licensed in another state by reciprocity is invalid and beyond the power granted them by the Legislature.
35-49	Nov 21	INSURANCE. AMENDING ARTICLES OF ASSOCIATION.	Certain insurance companies incorporated under the provisions of Art. 6, Chap. 37, R.S. 1939, may amend articles of incorporation as follows: "the corporation is specifically authorized to execute and guarantee any and all bonds and undertakings in judicial proceedings."
35-49	Dec 22	INSURANCE.	Approval of amendment of articles of Commonwealth Life and Accident Insurance Co.
37-49	Feb 7	MOTOR VEHICLES.	Determination of weight carrying capacity of half-track motor vehicle.
37-49	Mar 7	Col. David E. Harrison	WITHDRAWN
37-49	Mar 25	MOTOR VEHICLES.	Well drilling rig not required to be registered as motor vehicle.
37-49	Mar 31	SCHOOL DISTRICTS.	School districts adjacent to consolidated districts may move to join consolidated districts by petition.
37-49	Apr 15	Mr. David E. Harrison	WITHDRAWN
37-49	May 17	HIGHWAY PATROL.	Has authority to enforce regulations on privately owned and maintained roadways used by the public in general.
37-49	May 31	MILITARY FORCES.	Provision for compensation for members of Reserve Military Force does

			not apply to National Guard.
37-49	June 13	HIGHWAY PATROL. MOTOR VEHICLES.	Patrol has no authority to make charge for supplying copies of accident reports to interested parties.
37-49	July 19	SOLDIERS' BONUS.	Board of Review provided by Soldiers' Bonus Act still may pass upon applications for bonus.
37-49	July 29	MOTOR VEHICLES. HIGHWAY PATROL.	Automobile dealer who takes assignment in blank of title may not fill in name as assignee of his transferee.
37-49	Sept 24	HIGHWAY PATROL. MOTOR VEHICLES.	Patrol cannot change safety glass standard, and must approve all types conforming with Sec. 8391, R. S. Mo. 1939.
37-49	Dec 21	Col. David E. Harrison	WITHDRAWN
37-49	Dec 23	ESCHEATS.	Unclaimed money in hands of sheriff arising from partition sales to be paid into State Treasury upon order of the circuit court.
39-49	Sept 19	LIQUOR.	State of Missouri cannot prevent shipment of liquor from out-of-state distillers direct to officers' clubs located on military reservations.
40-49	Jan 28	ROADS. MAINTENANCE.	There is no duty imposed upon land owners abutting on a county road to remove growth and underbrush on the right-of-way.
40-49	Feb 16	COLLECTOR. TAXATION.	County Collectors not authorized to compromise penalties for nonpayment of merchant's tax; penalty collected should be turned in to the county.
41-49	May 24	DIVISION OF WELFARE. STATE TREASURER.	Certified copy of checks issued to old age assistance recipients competent evidence.
41-49	July 1	STATE TREASURER. RECORDS. EVIDENCE.	Who may inspect and obtain certified copies of records in the Office of State Treasurer.
41-49	Sept 20	SCHOOLS.	Duties of county and township collectors and treasurers under Senate Bill No. 307, Laws of Missouri, 1947, page 370.
41-49	Sept 27	WATER DISTRICTS. REVENUE BONDS. REGISTRATION.	Special obligation revenue bonds payable out of income of a public water district are not required to be registered by the State Auditor.
41-49	Nov 23	COUNTY CLERKS. CONSTITUTIONAL LAW.	Sec. 11238, H. B. No. 126, repeals fee provisions of Sec. 11049, Laws of Mo. 1947, Vol. II, p. 429. Fees provided in H. B. No. 126 can be retained by incumbent county clerks of third and fourth class counties.
42-49	Feb 28	PROBATE JUDGES. MAGISTRATES.	Probate judge and ex-officio magistrate in county of 30,000 inhabitants or less, files his official bond as prerequisite to qualifying for probate judge. Premium due on such bond is to be paid by County Court only

			when such bond is a surety bond authorized by the county under the provisions of Sec. 3238, R.S. Mo. 1939. Cost of such bond not to be paid out of State Magistrate fund.
42-49	July 11	COUNTY TREASURERS. EX-OFFICIO COLLECTORS.	Provisions of House Bill No. 80 not applicable to incumbent treasurers and ex-officio collectors.
42-49	Nov 21	OPENING OF COURTS.	No formal opening of Probate or Magistrates court is required.
44-49	Oct 24	INSANE PERSONS.	Sheriff entitled to fee for executing warrant of arrest in insanity proceedings.
45-49	Jan 5	PAUPERS.	County court under facts and circumstances stated is obligated to take care of said poor persons notwithstanding the fact he is not an inhabitant of said county.
45-49	Feb 1	HOSPITALS. COUNTIES. STATE AID.	A county in which is located a city which has received state aid for memorial airport is eligible to receive state aid for county memorial hospital if county has not received state aid for county memorial hospital.
45-49	July 26	INSANE PERSONS. PROBATE COURTS.	Insane person admitted to state hospital retains residence had at time of admission.
45-49	Oct 24	MOTOR FUEL USE TAX. TAXES.	Counties are not liable for payment of the Motor Fuel Use Tax for fuel consumed by motor vehicles used in repairing and maintaining county roads.
47-49	July 24	ADMINISTRATION AND FINAL SETTLEMENT NOTICE.	Notice of appointment of administrator and of final settlement should appear in four successive weekly insertions in paper.
48-49	May 9	EVIDENCE. ADMISSIBILITY.	A person who is in a condition capable of giving consent to the taking of a sample of his blood for the purpose of testing it for alcoholic content, where a sample of blood is taken and is duly tested by an accredited chemist, chemist may testify in court regarding his findings with respect to alcoholic content in blood tested.
48-49	June 13	LIBRARIES.	Equalization grants should be made on a population basis to county or regional libraries in all districts in which a one mill or more tax does not yield a dollar per capita to said libraries.
49-49	July 12	COUNTY COURTS. CLOSING PUBLIC ROADS.	A county court may order a public road vacated upon a finding that no necessity for such road exists.
49-49	Sept 7	Hon. Robert G.	WITHDRAWN

		Kirkland	
49-49	Oct 15	HOSPITAL. INSANE.	Pay patients cannot be evicted from state hospital to make room for indigent insane.
49-49	Oct 24	OFFICERS.	Clerk of the Circuit Court liable on official bond for funds and property in his custody by virtue of his office.
49-49	Nov 16	CIRCUIT JUDGE. ORDINANCES. VENUE. APPEALS.	Appeals from Municipal Court of Kansas City, Missouri, are to Circuit Court of Jackson County even though violation may have occurred in that part of Kansas City situated in Clay County.
49-49	Dec 19	HEALTH.	Deputy State Commissioner of Health appointed by the county court in a county of the third class shall be appointed for a term of one year and said term of office shall commence on the date of the appointment first made by the county court. A county of the third class can have only one deputy state commissioner of health at any given time.
51-49	Feb 15	Hon. Howard B. Lang	WITHDRAWN
51-49	Feb 21	COUNTY HIGHWAY ENGINEER.	(1) County highway engineer in third class county authorized to appoint assistants only upon determination of inability to properly perform all the duties of office. (2) Salary of county highway engineer in counties of the third class and necessary assistants to be paid out of Class 4 Funds.
51-49	May 18	NEWSPAPERS.	Weekly newspaper must be published regularly and consecutively, each week, for three years to qualify to publish legal notices.
51-49	July 19	ROADS AND BRIDGES.	Bridge across ditch in drainage district organized by circuit court is maintained by county if county court has adjudged bridge sufficient, but by drainage district if county court has not adjudged bridge sufficient.
51-49	Sept 1	MOTOR VEHICLES.	Gross weight of combination of commercial motor vehicle and trailer to be used in computing registration fee for the commercial motor vehicle.
54-49	Feb 17	FOOD AND DRUG. HEALTH.	Imitation vanilla not labeled "imitation" violates provisions of Pure Food and Drug Act.
54-49	Apr 21	MISSOURI STATE SOIL DISTRICTS COMMISSION.	Members of Commission may not vote by mail upon matters pertaining to the duties of the Commission; Commission proceedings must be fully recorded in the minutes of the Commission; Commission is required to formulate and fix rules for the holding of referendums; duty of Commission to conduct referendums or designate a disinterested and competent person, or persons, to do so; failure of

		Missouri State Soil Districts Commission to follow procedure prescribed in the Act creating it will invalidate its actions.
Apr 27	DANGEROUS INSANE PERSONS.	1. The County Jail is a suitable place for the confinement of a dangerous insane person within the meaning of Sec. 9336 R.S.A. Mo., 1939, pending the adjudication of the question of sanity. 2. The sheriff is not restricted by the Statute to the county jail as a place of confinement of such patients. 3. The State Hospitals are not available as places of confinement for such insane persons before they have been adjudicated insane by the court.
May 25	PAROLE, AND TERMINATION THEREOF BY THE CIRCUIT COURT.	When the Circuit Court grants a parole to a convict who is a first offender and who has been sentenced to the penitentiary, said parole when terminated by order of Court directing Circuit Clerk to place in hands of Sheriff copy of the sentence and certificate certifying that parole has been terminated, parole is at an end and may not be revived by any subsequent action of the Court.
Jan 31	COUNTY SURVEYOR. FEES.	County surveyor cannot make charge exceeding the amount set out in the statutes.
Feb 24	OFFICERS. PUBLIC BUILDINGS.	Public officers need not accept low bid for a building when, in their discretion, the low bid is not the best bid.
Mar 10	MAGISTRATES. JURORS. FEES AND COMPENSATION.	Person summoned as juror under provisions of Section 15a, Laws of 1947, Vol. I, page 248, and who appears in court but whose name is scratched, receives compensation and mileage provided in such section.
Mar 28	TRIAL AND PANEL. MAGISTRATE JURIES.	Magistrate may obtain jury panel from county panel or by summons. Jury should be twelve in number unless less number agreed upon. Panel should consist of twenty-four.
Apr 7	ADOPTION OF MINORS. CONSENT; NOTICE TO PARENTS.	When consent of parents may be dispensed with; notice of proceedings must be served on parents.
Apr 11	HEALTH BUILDINGS APPROPRIATIONS.	No specified number of houses for physicians required under the provisions of appropriations set out of pages 107 and 189, Laws of Mo. 1947, Vol. II.
May 2	Hon. Samuel Marsh	WITHDRAWN
May 20	GREAT SEAL OF THE STATE OF MISSOURI. PROCUREMENT. DEVICE.	Secretary of State authorized to procure a new great seal; but no choice of device to be engraved on same, as device is not subject to change, but must comply strictly with Section 15437, R. S. Mo. 1939.
	May 25 Jan 31 Feb 24 Mar 10 Mar 28 Apr 7 Apr 11	PERSONS. PERSONS. PERSONS. May 25 PAROLE, AND TERMINATION THEREOF BY THE CIRCUIT COURT. Jan 31 COUNTY SURVEYOR. FEES. Feb 24 OFFICERS. PUBLIC BUILDINGS. Mar 10 MAGISTRATES. JURORS. FEES AND COMPENSATION. Mar 28 TRIAL AND PANEL. MAGISTRATE JURIES. Apr 7 ADOPTION OF MINORS. CONSENT; NOTICE TO PARENTS. Apr 11 HEALTH BUILDINGS APPROPRIATIONS. May 2 Hon. Samuel Marsh May 20 GREAT SEAL OF THE STATE OF MISSOURI. PROCUREMENT.

57-49	June 27	TAXATION. COUNTY COURTS. ELECTIONS. ROADS AND BRIDGES.	When tax is voted by the people under provisions of Sections 8529, 8530 and 8531, Laws of Missouri, 1945, page 1478, county court has no discretion as to whether or not levy shall be made, and no election may be held to nullify such tax.
57-49	Aug 17	ELEEMOSYNARY INSTITUTIONS. HOSPITALS (COUNTY & CITY). INSANE PERSONS.	(1) Counties and cities qualify for State aid for care of insane persons when they maintain wards or sections in hospitals caring for other types of patients. (2) Payments not limited to persons adjudged insane by a court. (3) Payments may be made only for the care, detention or treatment of indigent insane persons. (4) The claim for Kansas City may not be paid out of the appropriation as passed by the 64th General Assembly.
57-49	Aug 17	ELECTIONS. COUNTY COURT.	Purchase of election supplies made by County Clerk. Section 10932, R.S.A., relating to advertising for bids inapplicable to third and fourth class counties.
57-49	Oct 10	HEALTH. PUBLIC BUILDINGS.	Under facts presented, public officials may not permit reformation of bid.
57-49	Oct 20	Hon. Gordon J. Massey	WITHDRAWN
57-49	Nov 29	CRIMINAL LAW. EXPLOSIVES.	Employer may not transport employees to work in truck in which dynamite is also carried without violating Section 4552, R.S. Mo. 1939.
59-49	Apr 12	SCHOOLS. ELECTIONS. BONDS.	A school board may use the funds realized from a bond issue only for the purpose for which the electors of the school district voted the issue. A proposition to change or modify the purpose of the fund cannot be thereafter submitted to the voters.
60-49	Dec 11	Hon. Emory L. Melton	WITHDRAWN
62-49	Feb 1	SHERIFFS.	Sheriff must pay for own surety bond unless county court specifically requests that sheriff give surety bond. Sheriff has custody of jail but of no other part of court house.
62-49	Mar 10	ELECTIONS.	Board of Election Commissioners of Jackson County empowered to alter election precinct boundaries within fire protection district. Cost of election within such fire protection district to be borne by such district.
62-49	Apr 27	SCHOOLS.	Majority of quorum of county school board has power to approve county reorganization.
62-49	June 18	PUBLIC ADMINISTRATORS. GUARDIANS. COUNTY COURT.	Public Administrator appointed Guardian of incompetent persons receiving old age assistance cannot be paid commission from county funds.
62-49	Oct 5	STATE SOIL DISTRICTS	In the election of soil district supervisors in a previously organized

		COMMISSION.	district balloting may be wholly by mail according to rules and regulations promulgated by the State Soil Districts Commission.
62-49	Oct 20	TENNESSEE- MISSOURI BRIDGE COMMISSION.	Questions relating to the administration of the Tennessee-Missouri Bridge Commission as a division of the Department of Business and Administration.
63-49	Jan 17	COUNTY COURT.	Roads, Bridges and Schools. How funds received from federal government on account of leasing of lands acquired for flood control purposes shall be distributed by County Court.
63-49	Apr 28	Hon. Tom B. Mobley	WITHDRAWN
63-49	Oct 31	APPROPRIATIONS. DEPT. OF RESOURCES AND DEVELOPMENT.	State funds granted in aid of cities, towns and counties under Laws of Mo. 1945, p. 1315, do not become fixed obligation of the state until final release by the Governor.
63-49	Nov 28	PROBATE JUDGE.	Probate Judge acting as own clerk not entitled to receive compensation other than his compensation as probate judge.
63-49	Dec 7	COUNTY HOSPITALS.	Bonds, sinking fund, unexpended balance remaining after creation of sinking fund to be deposited in county hospital fund.
63-49	Dec 12	COUNTY HOSPITALS. BONDS.	Interest and sinking fund of county hospital bond issue to be kept in separate account, and all taxes collected therefor to be placed in this account.
64-49	Mar 24	SHERIFFS. ELECTIONS.	Sheriffs of third class counties may appoint deputies to assist him in election duties. Such deputies must look to Sheriff for their compensation.
64-49	Nov 21	WORKMEN'S COMPENSATION. SECOND INJURY FUND.	The State Treasurer as Custodian of the Second Injury Fund under the Compensation Act may agree to a settlement and compromise of a claim against said fund, subject to the approval of the Commission. No Appropriation Act is necessary to appropriate the money before a payment is made out of said fund by the Custodian.
64-49	Nov 30	STATE TREASURER.	May accept payments from estate of Rosa Ruhland to be credited to Federal Soldiers' Home Fund. Memorial fund not to be established therefor.
65-49	Mar 16	MOTOR VEHICLES.	Jurisdiction of Commissioner suspended during pendency of appeal from order cancelling, suspending or revoking driver's license. Further orders during this time void.
65-49	May 27	DIVISION OF MENTAL DISEASES. CONTRACT WITH MUNICIPALITY FOR HOSPITAL FACILITIES	(1) The Division of Mental Diseases cannot enter into a contract with the Board of Education to furnish teaching services for the St. Louis State Training School. (2) Said Division cannot enter into contract with the City of St. Louis, a municipal corporation for services of interns and resident physicians of the St. Louis City Hospital to be rendered to the

		AND SERVICES.	St. Louis State Hospital.
65-49	June 13	RECORDERS. VETERANS.	Recorders allowed additional fee only when certified copy of discharge is furnished upon request.
67-49	Jan 18	HIGHWAY COMMISSION.	Legislature may not limit expenditure from state road fund.
67-49	May 25	COUNTY SURVEYOR.	Vacancy filled by appointment by Governor; appointee need not be resident of county.
67-49	Oct 31	APPROPRIATION. CIVIL AIR PATROL. DEPT. OF RESOURCES AND DEVELOPMENT.	Legislature may appropriate funds to the Dept. of Resources and Development to aid in an educational program related to aviation such as that fostered by the Civil Air Patrol.
<u>68-49</u>	Mar 25	AUTOMOBILES.	Registered dealers in automobiles required to maintain record prescribed by subparagraph (b) of Sec. 8381, R.S. Mo. 1939.
68-49	June 30	COUNTY COURTS.	Action of county court in providing for adoption and carrying out of county plan and appointing county planning commission, regulating and restricting height, number of stories, etc., of buildings dividing the unincorporated territory of county into various districts, and providing manner in which the regulations, restrictions and boundaries of the districts shall be determined, established and enforced is exercising administrative and not judicial power.
68-49	July 18	ATHLETIC COMMISSION.	Proceeds to licensee from concessions are part of gross receipts of boxing or wrestling exhibitions.
68-49	Oct 31	VITAL STATISTICS. HEALTH. BIRTH CERTIFICATES.	Residents of Missouri born elsewhere may record such birth in this State if the birth is not recorded in any other State or county or municipal office upon the furnishing of proof required by the registrant.
69-49	Feb 3	COUNTY COURT. OFFICERS.	County officers in counties of the fourth class are unauthorized to purchase supplies for their respective offices.
69-49	Apr 20	CONSOLIDATED SCHOOLS.	The Board of Directors of a consolidated school district have full authority over all schools lying within the area of the consolidated district.
69-49	July 23	CONSERVATION COMMISSION. FISH AND GAME PERMITS.	Necessary that persons secure fishing permits before fishing in private waters in this state.
69-49	Dec 30	DIVISION OF WELFARE. RESIDENCE OF	To establish residence requires actual bodily presence in this state for one year combined with intention of remaining permanently or indefinitely, but continuous bodily presence is not required if residence

		DEPENDENT CHILDREN.	had been previously established in this state.
70-49	July 22	SCHOOLS. SCHOOL DISTRICTS.	Board of directors of common school district empowered to act until completion of organization of reorganized district.
70-49	Sept 10	SCHOOLS. TAXATION.	Tax rate applicable in reorganized school districts.
70-49	Sept 14	OFFICERS.	Prosecuting Attorneys are required to prosecute suits for the collection of delinquent personal taxes without additional compensation.
70-49	Sept 21	COUNTY TREASURERS.	County and township treasurers have no authority to hold or disburse funds of school districts enlarged or reorganized under the provisions of Section 1, Laws of Mo. 1947, Vol. II, page 371.
70-49	Nov 14	TAXATION.	Production of receipt of taxpayer for letter notifying him of suit essential for personal judgment for personal property taxes.
71-49	May 13	MAGISTRATES.	Maximum amount payable by state for clerk hire in St. Louis.
71-49	Oct 14	COUNTY LIBRARIES.	County Library Board may spend surplus funds for construction of building. May not obtain building under long-term lease with option to buy.
73-49	Feb 8	ELECTIONS.	Conviction upon plea of nolo contendere of Federal income tax evasion disqualifies voter.
74-49	Jan 25	COURT-MARTIAL.	Conviction by court-martial does not affect civil rights, except in case of desertion.
74-49	Aug 12	DOG LICENSE LAW.	Money derived from dog licenses and placed in "County Dog License Fund" may be used for payment of claims arising from damages sustained by livestock or poultry even though such claims accrued after the voters of the county voted to repeal the license tax on dogs.
74-49	Dec 13	ELECTIONS.	Tax levy election not invalid because only one polling place was designated by county court.
75-49	Jan 29	DENTAL HYGIENISTS.	Application of sodium fluoride by employees of United States Public Health Service not a violation of Missouri Licensing Law.
75-49	May 5	Hon. John M. Rice	WITHDRAWN
75-49	June 6	COUNTY FAIR. COUNTY COURT. INCORPORATION.	County court does have power to order incorporation of agricultural and mechanical societies under provisions of Section 14161, R. S. Mo. 1939.
75-49	Sept 15	CIRCUIT COURTS. COUNTY COURTS.	County, through the sheriff and county court, is under a duty to furnish to the Circuit Court Judge, upon his order, the facilities necessary for the holding of court and the administration of the court held in such

			county.
75-49	Oct 5	TAXATION. RAILROADS. SCHOOLS.	In computing the average rate of taxation to be levied against railroads and utilities for school purposes, the local rates of all school districts in the county, including those not wholly within the county, should be added together and divided by the total number of school districts in the county, including those districts not wholly within the county.
76-49	Dec 21	TAXATION. ASSESSORS.	Duty to call on and require taxpayer to return assessment list; but not required to view property or prepare list except where none is returned. Assessor may not require taxpayer to appear before him at designated time or place in county in lieu of his official call upon taxpayer.
77-49	Feb 9	LIBRARY ADVISORY BOARD. STATE LIBRARY.	Money received in trust for films not state money.
78-49	Feb 26	PENITENTIARY. MERIT SYSTEM.	Employees of State Penitentiary paid in accordance with State Merit System Act.
78-49	Nov 18	The St. Louis Court of Appeals	WITHDRAWN
78-49	Dec 28	TAXATION.	Property of Christian College is not rendered liable to taxation by reason of the ownership and maintenance of dormitories and cafeterias for students. Such property should not be assessed by assessor, but if assessed, county court may correct assessment and remit taxes levied against property.
80-49	Mar 16	CRIMINAL LAW. PROBATE COURTS PROHIBITION.	Section 4191, R.S. Mo. 1939, discloses exclusive procedural steps to be taken where a defendant has been charged, tried, convicted and sentenced and his insanity is suggested. Probate court is without authority to entertain insanity hearing in such cases. Prohibition will lie to restrain the probate court from exercising such jurisdiction.
81-49	Feb 28	SCHOOLS.	Taxpayers who pay school taxes voluntarily is not entitled to a refund even though tax is illegal.
81-49	Mar 10	ELECTIONS. COUNTY BUDGET. SCHOOLS (ANNUAL DISTRIBUTION).	Discretionary with county court to call special election to distribute annually capital of liquidated school fund. Election may be called even though not budgeted.
81-49	Mar 16	JUVENILES.	Who is responsible for medical and surgical needs of juveniles on replacement from the Training Schools. Four questions.
81-49	Mar 30	BANKS-BRANCH BANKING.	A bank is not carrying on branch banking in installing a pneumatic tube on a parking lot owned by the bank and across the street from its

			banking house for the purpose of allowing customers of the bank to place funds in said pneumatic tube to be carried underneath the street and up into the bank where such funds are deposited.
81-49	May 6	Mr. Oliver Senti	WITHDRAWN
81-49	June 9	JUVENILES.	Board of Training Schools cannot accept child into their custody until properly committed by a court of competent jurisdiction.
81-49	June 14	JUVENILES. MISSOURI BOARD OF TRAINING SCHOOLS.	Missouri Board of Training Schools shall accept custody of a boy over the age of 17 who has been committed to the custody of the Board of Training Schools before his 17th birthday.
81-49	July 14	COUNTY BOARDS OF EQUALIZATION.	Deputy County Surveyor may not serve in place of County Surveyor as a member of County Board of Equalization.
81-49	July 27	CONSTITUTIONAL LAW. OFFICERS.	Provisions of House Bill No. 297 of the Sixty-Fifth General Assembly applicable to incumbents in office of Prosecuting Attorney during current term.
81-49	Nov 22	JUVENILES.	Missouri State Board of Training Schools, authorized to transfer juveniles placed in their care to the State Hospital at Farmington, Missouri for specialized care and treatment.
81-49	Dec 6	JUVENILES.	Industrial Home for Girls at Chillicothe cannot legally detain and restrain a child committed to their care beyond the child's twenty-first birthday.
83-49	May 3	REPEAL OF TOWNSHIP ORGANIZATION CHAPTER CONTEMPLATED BY SENATE BILL NO. 72, 65TH GENERAL ASSEMBLY.	Proposed amendment to Senate Bill No. 72 providing that county treasurers in former township organization counties shall be county collectors until successors are elected and qualified is unconstitutional as local and special law.
83-49	June 27	MISSOURI SECURITIES LAW EXEMPTIONS. CORPORATIONS. EXEMPTIONS UNDER MISSOURI SECURITIES LAW. PUBLIC UTILITY HOLDING COMPANIES.	Such companies and their subsidiaries registered under the Public Utility Holding Company Act of 1935 exempt under the provisions of the Missouri Securities Law.
83-49	July 25	Hon. John B. Smoot	WITHDRAWN
83-49	July 25		WITHDRAWN

83-49	Sept 27	REFERENDUM. ELECTIONS.	Special election for referendum vote on bills which passed in the 65th General Assembly and for which referendum petitions have been presented may be ordered.
83-49	Oct 10	TAXATION.	H.C.S.H.B. 185, 65th G.A., still permits refunds for motor fuel sold for non-highway use.
83-49	Oct 27	SECRETARY OF STATE. NAMES. FICTITIOUS NAMES.	An individual doing business under a firm name, which includes only the surname, a word descriptive of the business and the word "company," should register under the Fictitious Names Registration Act. A person using both the surname and Christian name is not required to register.
83-49	Oct 28	ELECTIONS. REFERENDUMS. LEGISLATURE. APPROPRIATIONS.	Special election for referendum may be ordered by General Assembly at a special session. Expenses incurred at such election may be paid by the state if law authorizing such payment is passed.
83-49	Nov 3	Hon. Forrest Smith	WITHDRAWN
84-49	June 27		Opinion Letter to the Hon. Forrest Smith
84-49	Nov 9	PROBATE COURT.	Probate clerks may not receive increased compensation based upon increased valuation during term of Probate Judge.
84-49	Nov 16	FIRE PROTECTION DISTRICTS. CITIES.	Upon incorporation of a city wholly within a fire protection district the property within the city remains subject to the jurisdiction and taxation of the fire protection district.
86-49	Jan 27	COUNTY TREASURER EX OFFICIO COLLECTOR. TOWNSHIP FORM OF GOVERNMENT. PAYMENT OF DEPUTY COLLECTOR.	County Treasurer, ex officio collector in county under township organization can not procure payment of deputy collector out of a county general revenue.
86-49	Aug 5	COUNTY JUDGES.	Judges of county courts in counties of the Third Class, when acting as board of equalization, shall receive no mileage fee for travel to or from meetings of such board.
86-49	Oct 5	OFFICERS. BAIL BOND. SHERIFFS.	Sheriffs required to receive into county jail persons arrested without warrant. Sheriffs not authorized to fix bail of persons arrested without warrant.
86-49	Oct 24	POST-DATED CHECKS.	(1) The drawer of the post-dated check given in payment of a pre- existing debt, which is not paid on presentation, is chargeable under R.S. 1939, Sec. 4695; (2) The drawer of a post-dated check given for

			money or property who states that the check is not good but will be good on its date, and which is not paid on presentation, is chargeable under R.S. 1939, Sec. 4695; (3) The drawer of a post-dated check given to a sheriff in payment of an execution, which is not paid on presentation, is chargeable under R.S. 1939, Sec. 4695. Sheriff should not accept post-dated check in payment of execution.
86-49	Dec 3	MAGISTRATE COURTS.	Procedure in cases where parties fail to appear.
86-49	Dec 20	DEPUTY SHERIFF. FEES FOR TRANSPORTATION OF PRISONERS.	Deputy sheriff may be employed as a guard to assist sheriff to transport prisoners to the State Penitentiary; fees received for the performance of such services shall be collected by the sheriff for the county and paid by him into the county treasury.
87-49	Mar 21	CONSERVATION COMMISSION.	Agents may enter posted land in performance of duty.
87-49	May 6	OFFICERS.	Office of mayor and that of circuit clerk and recorder are compatible.
87-49	June 9	PROBATE COURT. COSTS. CLERKS. COURTS.	Cost of publishing probate court docket which exceeds the statutory amount allowed to be charged against estates for that purpose, shall be paid out of the county treasury.
87-49	June 30	CORPORATIONS. PROXIES. COUNTY HEALTH CENTERS.	(1) At common law, no right to vote by proxy at a corporate election; (2) Proxy voting may be permitted by bylaws.
87-49	Aug 26	MERIT SYSTEMS. COUNTY HEALTH CENTERS. HEALTH.	State Merit System Act not applicable to County Public Health Centers.
88-49	April 15	SEWERS. TAXATION FOR CONSTRUCTION AND MAINTENANCE.	City of the third and fourth class may levy a tax upon property within its corporate limits to pay for a public sewer system although some of the persons thus taxed do not receive service from the system because sewerage mains have not been laid adjacent to their property.
88-49	Oct 28	PURCHASING AGENT. STATE CONTRACTS.	Lease of premises for and in behalf of state department must be negotiated by State Purchasing Agent.
89-49	Feb 15	NOTARIES PUBLIC.	A Notary Public cannot legally notarize documents under any name other than his or her legal name.
89-49	Feb 17	SECRETARY OF STATE.	Deed may be withdrawn for recording.
89-49	Feb 18	CORONERS.	Vacancy created in office on failure of coroner-elect to give bond. Incumbent coroner entitled to hold over in office until vacancy filled.

89-49	Apr 9	LIQUOR. JUDGMENTS.	Intoxicating liquor may be sold under execution to satisfy a judgment for a debt.
89-49	Apr 29	Hon. J. W. Thurmond	WITHDRAWN
89-49	May 23	CO-OPERATIVE. CORPORATIONS.	Co-operative organized under laws of District of Columbia may qualify to do business in Missouri.
89-49	June 22	DELINQUENT TAX SALES.	In order to get a collector's deed the holder of a collector's tax sales certificate of purchase must obtain from the collector and record such deed within four years of the time of said sale of such realty.
89-49	Aug 16	DOCUMENTARY EVIDENCE OF MARRIAGE CONTRACTED IN ARKANSAS OFFERED IN CIRCUIT COURT IN THE STATE OF MISSOURI.	A certified copy of the record of a marriage contracted in the State of Arkansas is admissible in the circuit court, State of Missouri, if it is attested by the seal of office of the county official in Arkansas known as clerk and recorder.
89-49	Sept 17	GOVERNOR. SECRETARY OF STATE. PATENTS.	Patent to certain real estate should be issued by Governor and countersigned by Secretary of State.
89-49	Oct 26	REFERENDUM.	Opinion Letter to the Hon. Walter H. Toberman
89-49	Dec 27	REFERENDUM. SECRETARY OF STATE.	Law to be voted on at referendum election to be published in newspapers designated by the Secretary of State.
90-49	Apr 7	Mr. Ralph J. Turner	WITHDRAWN
90-49	May 5	MERIT SYSTEM.	(1) Employees may voluntarily join or belong to a political club. (2) Employees may be solicited for membership. (3) Employees may make voluntary political contributions. (4) Unlawful to solicit political contributions from Merit System employees.
90-49	Sept 28	Hon. Ralph J. Turner	WITHDRAWN
92-49	Feb 28	LIQUOR. CRIMINAL LAW.	Conviction of employee does not have effect of automatically revoking permit of licensee.
92-49	July 21	LIQUOR. CRIMINAL LAW.	Construing Sections 4881, 4891 and 4892 Mo. R.S.A. relative to employee of licensee making sale during restricted period under Section 4991.
92-49	Oct 11	TAXATION.	Enlarged special road district entitled to proportionate share of road tax money thereafter collected in such enlarged special road district.
92-49	Nov 2	Hon. Raymond H. Vogel	WITHDRAWN

92-49	Nov 21	USURY.	Note given for the purchase price of an article exacts usurious interest if the note provides for a larger rate than the law allows. Interest charged for the use of money in excess of 2% per month constitutes usury.
93-49	Jan 21	Col. Hugh H. Waggoner	WITHDRAWN
93-49	Mar 18	MAGISTRATE JURIES. CIRCUIT CLERKS. BOARD OF JURY COMMISSIONERS.	Board of jury commissioners and circuit clerk to select magistrate jurie in counties of the third and fourth classes.
94-49	Aug 27	SAVINGS AND LOAN.	Effective date of bill providing increase in salary of supervisor and employees.
95-49	July 18	PROSECUTING ATTORNEYS. BUDGET LAW.	Increase in salaries of prosecuting attorneys effective July 7, 1949, is automatically included in the budget for the year 1949.
96-49	Jan 14	Hon. Hubert Wheeler	WITHDRAWN
<u>96-49</u>	Mar 3	PUBLIC SCHOOLS.	Transfer of interest and sinking fund balance is not permitted by section 10366 R.S.A. Mo. 1939, until both interest and principal of indebtedness for payment of which such funds were created has been paid in its entirety.
96-49	May 13	SCHOOLS.	Marriage of pupil is not grounds for dismissal.
96-49	June 8	SCHOOLS.	State Board of Education authorized to adjust and settle boundary dispute when matter is submitted by contending county boards of education under subparagraph (4) of Section 6, S. B. No. 307, Laws of Mo. 1947, Vol. II, p. 370.
96-49	Nov 29	PROSECUTING ATTORNEYS. SCHOOLS.	Prosecuting Attorneys are required to represent and defend County Superintendents of Schools in civil suits filed against such officials involving their official acts.
97-49	Feb 18	HEALTH, DIVISION OF.	Members of State Hospital Advisory Council serve until successors appointed.
97-49	Feb 28	PARENT AND CHILD. DIVORCE.	Parent failing to pay maintenance money for a minor child in accord with divorce decree is liable to prosecution under nonsupport statute.
97-49	May 10	PROBATE JUDGE. MAGISTRATE. OFFICERS.	Probate judge and ex officio magistrate may not be a member of a county library board.
97-49	May 31	PUBLIC OFFICERS.	Local deputy commissioner of the motor vehicle registration department may be appointed deputy sheriff.

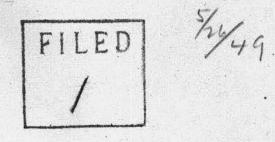
97-49	June 10	Hon. Homer F. Williams	WITHDRAWN
97-49	June 27	CRIMINAL LAW. SUPPORT OF MINOR CHILD. VENUE. JURISDICTION. CHILD SUPPORT.	The venue and jurisdiction of a prosecution under Sect. 4420, Laws of 1947, Vol. I, p. 259, lies in the county in which the minor child is residing at the time the father fails to support and maintain said child.
97-49	Aug 9	MAGISTRATE COURTS. FEES. CRIMINAL LAW.	No fee allowed magistrate court for issuance of a search warrant where no criminal proceeding against an individual is instituted.
97-49	Aug 23	PROSECUTING ATTORNEYS. DUTIES.	Not duty of Prosecuting Attorney to advise or represent special road districts in his county.
97-49	Aug 27	GAMBLING. BINGO. KENO.	The operation of a "bingo game" is a violation of the laws of this state.
97-49	Oct 13	ESCAPE FROM COUNTY JAIL.	Prisoner given jail liberties by sheriff or jailer who leaves without legal authority is guilty of escape.
97-49	Nov 23	COUNTY WARRANT.	County Court may issue a duplicate warrant when original has been lost or destroyed before being presented for payment, and county treasurer shall pay said duplicate.
97-49	Dec 31	MAGISTRATES.	\$5.00 fee not refunded when no summons is issued and cause dismissed by plaintiff.

TAXATION AND REVENUE:

Corporate taxpayer receiving authority to file income tax return after due date thereof does not thereby forfeit option to pay tax due in installments.

May 5, 1949

Mr. T. R. Allen
Supervisor, Income Tax
Department of Revenue
Capitol Building
Jefferson City, Missouri



Dear Sir:

Reference is made to your request for an official opinion of this department reading as follows:

"In view of circumstances which have arisen in connection with the administration of Section 11367 and 11369, R. S. Mo. 1939, and Amended Laws, this department desires a written opinion by which to be governed.

"First, Section 11369 provides for the granting of extensions of time to corporations not to exceed thirty days. Second, Section 11367 provides that the taxpayer may elect to pay taxes in excess of ten dollars in four equal installments. This section also provides that returns be filed on or before the thirty-first day of March and that the tax becomes delinquent on the first day of April.

"In the granting of an extension of thirty days under which the taxpayer electing to avail himself the option of installment payment does he disqualify his right to installment payments by the granting of the extension inasmuch as Section 11367 does provide that where an installment is not paid on original due date requires that the payment of the full amount of tax becomes due and payable at once?

"This, of course, contemplates that the taxpayer files his return and makes the first installment payment within the period of time granted by the extension.

May 5, 1949

"I shall appreciate very much your prompt action with regard to this ruling as it will affect the administration of this section with regards to returns being filed at this time."

Section 11369, Mo. R. S. A., mentioned in your letter of inquiry, reads as follows insofar as the same pertains to the question under consideration:

"In case of neglect occasioned by the sickness or absence of an officer of any corporation, joint stock company or association required to make and file a return, or for other sufficient reason, the Director of Revenue may allow such further time for making and filing such return as he may deem necessary, not to exceed thirty days. * * *

The privilege of paying income tax in installments is granted under Section 11367, Mo. R. S. A. This section reads in part as follows:

"* * *The taxpayer may elect to pay taxes in excess of ten dollars in four equal installments; in which case the first installment shall be paid on the day preceding the date on which the taxes shall become delinquent; the second installment shall be paid on or before the last day of the third month; the third installment shall be paid on or before the last day of the sixth month; and the fourth installment shall be paid on or before the last day of the ninth month after such date. If any installment is not paid on or before the date fixed for its payment the whole amount of taxes unpaid shall become delinquent. * * *"

We have carefully examined other statutes relating to the payment of income tax, and we do not find that the granting of an extension of time for the filing of the return will cause the corporate taxpayer to forfeit the privilege of paying the tax due in installments.

CONCLUSION.

In the premises we are of the opinion that a corporate taxpayer that has been permitted to file its return within a period

May 5, 1949 Mr. T. R. Allen -3not greater than thirty days subsequent to the filing date provided by law may yet avail itself of the privilege of paying the income tax due in four equal installments as provided by Section 11367, Mo. R. S. A. Respectfully submitted, WILL F. BERRY, JR. APPROVED: Assistant Attorney General J. E. TAYLOR Attorney General WFB/few

MOTOR VEHICLES:

SUSPENSION OF DRIVERS! LICENSES: Section 8461 R.S.A. Mo., 1939, not repealed by section 5 of Motor Vehicle Safety Responsibility Law, Laws of Missouri, 1945, pages 1207 to 1222 inclusive, and particularly sections 5 thereof, although modified and supplemented thereby.

May 13, 1949

Mr. John Allison, Supervisor Motor Vehicle Registration and Drivers' License State Capitol Jefferson City, Missouri

Dear Mr. Allison:

We have a letter dated March 8, 1949, of Mr. R. N. Eidson, your predecessor in office, in which he requests an opinion of this department. His letter is as follows:

This department respectfully requests an opinion from your office as to certain sections in the Drivers' License Law, i.e. Section 8461, Page 122 and Section 5, Page 8 of the Motor Vehicle Safety Responsibility Law as to whether there is a conflict in the two laws.

"We are not sure that we can refuse to issue a new Driver's License, after the old one has been revoked for one year. According to the Motor Vehicle Safety Responsibility Law this department can refuse to issue a new license, unless the judgment has been satisfied and the judgment debtor gives proof of Financial Responsibility in the future.

"But, according to the Drivers' License Law, we can not suspend or revoke a Driver's License for a period of more than one year. In the case in point, we took up and revoked a Driver's License last February 6, 1948 because the judgment rendered against the holder of the Driver's License had not been satisfied and is still unsatisfied."

We have given the question involved careful thought, and have examined the two statutes cited by Mr. Eidson, and we are of the opinion that while there is a partial conflict between the two sections cited, the section which is a part of the Motor Vehicle Safety Responsibility Law, does not repeal the section 8461 R.S.A. Mo., 1939, but merely supplements it and modifies it in cases which certain circumstances exist.

Section 8461 R.S.A. Mo., 1939, one of the sections cited,

FILED!

provides as follows:

"The commissioner shall not suspend a license for a period of more than one year and upon revoking a license shall not in any event grant application for a new license until the expiration of one year after such revocation."

The section last cited above was enacted in 1942.

The Act known as the Motor Vehicle Safety Responsibility Law, Laws of Missouri 1945, pages 1207 to 1222 inclusive was enacted in 1946, about four years subsequent to the aforesaid section 8461. Section 5 of said Act enacted in 1946, as aforesaid, and cited by your department in its opinion request is in part as follows:

The pertinent part of the section last quoted is as follows:

"The suspension required in Section 4 shall remain in effect * * * unless and until such judgment is satisfied or stayed and the judgment debtor gives proof of financial responsibility in the future as hereinafter provided * * * * *."

From a comparison of the two sections above quoted, it is clearly apparent that the 1942 Act provides that a driver's license shall not be suspended for more than one year, whereas, the later Act provides in effect that when the suspension results from failure on the part of the holder of the license to pay any judgment for

damages rendered against him growing out of his negligence from operating his motor vehicle, a suspension of his license remains in effect until he pays the judgment and gives satisfactory evidence to the commissioner of his financial responsibility, even though the last mentioned effective period of the suspension might extend far beyond a year.

Your question is whether in a case in which a driver's license can be suspended because of the driver's failure to pay a judgment against him within thirty days of its rendition and in which more than a year has elapsed since such suspension, there having been no satisfaction of said judgment or proof of financial responsibility, the commissioner of motor vehicles is justified pursuant to the provision of the last above quoted section in refusing to issue a new driver's license.

In answering your question we call attention to the fact that Section 33 of the last quoted Act provides as follows:

"This Act shall in no respect be considered as a repeal of the provisions of the State Motor Vehicle Laws, but shall be considered as supplemental thereto."

In view of the provision of the later Act to the effect that it is not to be considered as a repeal of the provisions of the earlier Act, we are of the opinion that it is quite clear that Section 8461 R.S.A. Mo., 1939, is not repealed by the later Act, but in view of the statement in the later Act that it is to be considered as supplementary to the earlier Act, and in view of the provision of the later Act that suspensions of drivers' licenses must continue unless and until the judgment shall be paid and proof of financial responsibility furnished, we are of the opinion that Section 8461 R.S.A. Mo., 1939 is supplemented with an exception to the effect that in the event that the suspension grew out of the failure of the driver to pay a judgment for damages and furnish proof of financial responsibility, the suspension of the license shall endure until such judgment shall be paid and such proof of financial responsibility furnished.

CONCLUSION.

We are, therefore, of the opinion that suspensions of drivers' licenses may endure for only one year unless they occurred as a

Respectfully submitted,

SAMUEL M. WATSON Assistant Attorney General

APPROVED:

J. E. TAYLOR Attorney General

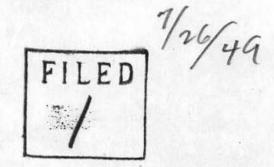
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TAXATION AND REVENUE:

The word "taxes" found in the Credit Institutions Tax Act of 1946 includes all governmental impositions by the state or any of its political subdivisions.

July 17, 1949

Mr. T. R. Allen Supervisor, Income Tax Division of Collection Department of Revenue Jefferson City, Missouri



Dear Sir:

Reference is made to your request for an official opinion of this office reading as follows:

"Re: House Bill 948 63rd General Assembly --Taxation and Revenue Relating to Taxation of Credit Institutions

"In connection with the above-referred to law this department desires a ruling covering an item of deduction allowed in arriving at the tax imposed by this act. In making direct reference I refer to Form 43-1, item 27 under the heading of 'Deductions' which reads as follows: 'Less: Credit for all taxes paid to the State of Missouri or any political subdivision thereof during the relevant income period, other than taxes on real estate, contributions paid pursuant to the Unemployment Compensation Tax Law of Missouri, and taxes imposed by this Act', in which a deduction is allowed from the amount of tax computed in arriving at the net amount due.

"Will you kindly advise if the following taxes qualify under the above item of deductions: Franchise taxes; filing fees; licenses, such as automobile, occupation; anti-trust affidavits, and items of a kindred nature will fall within the meaning of the above act as described."

The act which you have referred to is now found as Sections 11456.201 to 11456.213, inclusive, Mo. R.S.A., and is known as the "Credit Institutions Tax Act of 1946." Included in the act appears Section 11456.203, including the following as paragraph (e):

"Each taxpayer shall be entitled to credits against the tax imposed by this Act for all taxes paid to the State of Missouri or any political subdivision thereof during the relevant income period, other than taxes on real estate, contributions paid pursuant to the Unemployment Compensation Tax Law of Missouri and taxes imposed by this Act."

It therefore becomes necessary to determine a meaning to be accorded the word "taxes" as it appears in the exemption provision quoted.

The word "taxes" is defined in 61 C.J., page 65, paragraph 1, in the following language:

"The terms 'tax' and 'taxes' have been defined as a rate or sum of money assessed on the person or property of a citizen by government for the use of the nation or state; burdens or charges imposed by the legislative power upon persons or property to raise money for public purposes, and the enforced proportional contribution of persons and property levied by authority of the state for the support of government and for all public needs. * * *

To the same effect, see 51 Am. Jur., page 35, wherein the following appears:

"A tax is a forced burden, charge, exaction, imposition, or contribution assessed in accordance with some reasonable rule of apportionment by authority of a sovereign state upon the persons or property within its jurisdiction, to provide public revenue for the support of the government, the administration of the law, or the payment of public expenses. * * * "

That such definitions have been followed by the appellate courts of Missouri appears from Lucas vo. Murphy, 156 S.W. (2d) 686, l.c. 688, from which we quote:

" * * * 'Taxes are the enforced proportional contributions from persons and property,

levied by the state by virtue of its sovereignty for the support of the government and for all public needs. ! I Cooley, Taxation, section 1, p. 61. * * * * "

Standing alone, there can be little doubt but that the word "taxes" is broad enough to encompass any and all impositions placed upon its citizens by a sovereign state. However, the word is frequently used so that when viewed in its context, it may have a more restricted and limited meaning. For a complete exposition of such varying uses, see 51 Am. Jur., pages 45 to 51, inclusive. We do not find a statutory definition of the term incorporated in the laws of Missouri except in two statutes dealing with cities and relating to the sales tax. The first two mentioned, being Sections 6372 and 6724, R. S. Mo. 1939, indicate that the General Assembly has in each of those instances defined the word to be one which must be construed in accordance with a meaning to be determined by the sense in which it is used. The third section, Section 11407, R. S. Mo. 1939, makes the definition one of limited application.

Were it not for the inclusion in the exemption provision of the phrase "contributions paid pursuant to the Unemployment Compensation Tax Law of Missouri," it might be very well held that the word "taxes" as used in such exemption provision would be limited only to those imposts bearing the characteristics of being levied in aid of the general revenue of the state and disregarding all other excise, privilege franchises and similar exactions. The latter are those generally paid in return for privileges extended by the state, and for that reason have, upon occasion, been distinguished from taxes which are levied for the purpose of general revenue.

However, the inclusion of the phrase quoted necessarily leads to a different view. Such contributions have been held to be in the nature of an excise. We quote from Henry vs. Manzella, 201 S.W. (2d) 457, wherein the Supreme Court of Missouri said, 1.c. 459:

" * * It is settled that an unemployment compensation tax is an excise upon the relation of employment. A. J. Meyer & Co. v. Unemployment Compensation Commission, 348 Mo. 147, 152 S.W.2d 184; Lucas v. Murphy, 348 Mo. 1078, 156 S.W.2d 686; Streckfus Steamers, Inc., v. Keitel, 353 Mo. 409, 182 S.W.2d 587; Steward Machine Co. v. Davis, 301 U.S. 548, 57 S. Ct. 883, 81 L.Ed. 1279, 109 A.L.R. 1293."

It seems, therefore, that the inclusion of this phrase by inference at least indicates that other and similar excises are to be included within the meaning of the word "taxes" appearing in the exemption provision. Further supporting this view are the provisions of paragraph (c) of Section 11456.205, Mo. R.S.A., which provides for the method of computing net income of credit institutions subject to the taxing act. The only taxes therein authorized to be deducted in computing net income are set forth as follows:

" * * * all taxes paid or accrued during the income period to the United States and all taxes paid or accrued on real estate to the State of Missouri or any political subdivision thereof; all contributions paid or accrued pursuant to the Unemployment Compensation Law of Missouri; * * * * "

This indicates that inasmuch as excise and other privilege taxes may not be deducted in computing net income, such imposts are to be included within the meaning of the word "taxes" as used in the exemption provision.

In your letter of inquiry you have referred to various types of excise and privilege imposts. However, without further information as to the exact factual situation respecting each institution seeking to deduct such taxes, and in the absence of information as to the imposition of such taxes with respect to whether or not they have been imposed by the State of Missouri or one or more of its political subdivisions, we can but lay down the general rule which will be applicable.

CONCLUSION

In the premises, we are of the opinion that the word "taxes" as used in the exemption provision of the Credit Institutions Tax Act of 1946, being Section (e) of Section 11456.203, Mo. R.S.A., includes all imposts of every nature imposed by the State of Missouri or any of its political subdivisions.

Respectfully submitted,

APPROVED:

WILL F. BERRY, JR. Assistant Attorney General

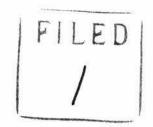
J. E. TAYLOR Attorney General

WFB:VLM

HEALTH & WELFARE: NARCOTIC DRUG LICENSE: Applications for a license to sell narcotic drugs are permanent records and cannot be destroyed. Such applications may be microfilmed, that fact certified to the Governor, who may order the original records destroyed.

August 16, 1949

Dr. C. F. Adams Acting Director Division of Health Jefferson City, Missouri



Dear Dr. Adams:

This department is in receipt of your recent request for an official opinion in regard to the following:

"1. In regard to the Narcotic Drug Act which is covered in Sections 9832 to Sections 9854:

"(a) We have kept in the files of this Division all the original applications for Narcotic Licenses, which are issued annually, and now have on hand these applications for the past eleven years. Will we be within our legal rights if we destroy the old application blanks and keep only those applications which are three years old, or less? If it is not permissable to destroy these old records, then will it be permissable to microfilm the old application records and destroy the original application?"

In the above you ask two questions, the first of which is:

"Will we be within our legal rights if we destroy the old application blanks and keep only those applications which are three years old, or less?"

In regard to the above we would direct your attention to Section 9834, Mo. R.S.A. 1939, which section states:

"No person shall manufacture, compound, mix, cultivate, grow, or by any other process produce or prepare narcotic drugs, and no person as a

wholesaler shall supply the same, without having first obtained a license so to do from the State Board of Health." (Now the Division of Health.)

We would also direct your attention to that portion of Section 9835, Mo. R. S. A. 1939, which states:

"No license shall be issued under the foregoing section unless and until the applicant therefor has furnished proof satisfactory to the State Board of Health." (Now the Division of Health.)

From the above it is made clear that a license to sell narcotic drugs must be obtained by the dealer by his making application therefor to the State Board of Health (now the Division of Health) which, if the applicant meets the requirements set forth in Section 9835, supra, (which requirements are not quoted by us) shall be issued by the State Board of Health (now the Division of Health).

We would call your further attention to Section 9761 which states:

"The secretary of the state board of health shall have supervision over the central bureau of vital statistics, which is hereby authorized to be established by said board, and shall act as state registrar of vital statistics. As secretary he shall receive an annual salary at the rate of twenty-four hundred dollars, payable monthly. The state board of health shall provide for such clerical and other assistance as may be necessary for the purpose of this article, who shall serve during the pleasure of the board, and may fix the compensation of persons thus employed within the amount appropriated therefor by the legislature. Suitable apartments shall be provided by the custodian of the capitol for the bureau of vital statistics and the state board of health (now the Division of Health), in the state capitol at Jefferson City, which shall be properly equipped with fireproof vault and filing cases for the permanent and safe preservation of all official records made and returned under

this article." (Insertion ours.)

It will be observed that the foregoing section states that:

"* * *Suitable apartments shall be provided by the custodian of the capitol for the bureau of vital statistics and the state board of health in the state capitol at Jefferson City, which shall be properly equipped with fireproof vault and filing cases for the permanent and safe preservation of all official records made and returned under this article."

We would call your further attention to Section 9744 Mo. R.S.A. 1939, which section states:

"The Governor, by and with the advice and consent of the Senate, shall appoint a Commissioner of Health, who shall hold his office for a term of four years, and who shall be a physician in good standing and of recognized professional and scientific knowledge and a graduate of a reputable medical school, and shall have been a resident of the State for at least five years next preceding his appointment, and in making such appointment there shall be no discrimination made against the different systems of medicine that are recognized as reputable by the laws of this State. The Commissioner of Health shall be subject to removal from office for cause by the Governor at his pleasure. The compensation of the Commissioner of Health shall be five thousand dollars (\$5000) per annum. He shall also receive traveling and other expenses necessarily incurred in the performance of his duties. The Commissioner of Health as hereby constituted shall assume all the rights, powers, privileges and duties heretofore conferred by law upon the Secretary of State Board of Health (now Division of Health) heretofore authorized by law, which office is hereby abolished. Where any law refers to the Secretary of the State Board of Health (now Division of Health) as heretofore constituted, same shall, after the passage of

this law, be construed as referring to and meaning the Commissioner of Health as hereby and herein constituted." (Insertion ours).

It will be observed that the foregoing section places in a Commissioner of Health all of the rights, powers, privileges and duties heretofore conferred by law upon the secretary of the State Board of Health which is referred to in Section 9761, supra, quoted above, and that the office of secretary is abolished.

Section 13, page 949, Laws Mo. 1945, states:

"All powers and duties heretofore under administration and control of the state board of health, except the examination and licensing of persons, shall henceforth be under administration and control of the department of public health and welfare and shall be assigned to the division of health within the department, together with all other powers and duties which may herein or hereafter be assigned. all laws of Missouri, and orders and findings issued thereunder, wherever the term state board of health is used, the term division of health shall hereafter be substituted and understood. The division of health shall also have control and administration over the Missouri state sanatorium at Mt. Vernon in the same manner and to the same extent as has heretofore been lawfully exercised by the board of managers of the state eleemosynary institutions under Article I, Chapter 51, Revised Statutes of Missouri, 1939, with amendments thereto. The division of health shall also have such jurisdiction over the accounts of city and county tuberculosis hospitals as has been heretofore been lawfully exercised by the board of managers of the state eleemosynary institutions. The cancer commission of the State of Missouri, as established by Chapter 125, Revised Statutes of Missouri, 1939, as amended, is hereby assigned to the division of health in the department of public health and welfare." (Underscoring ours.)

The above sections abolishes the State Board of Health, the Board of Managers of state eleemosynary institutions and the State Social Security Commission and establishes a department of Public Health and Welfare composed of three divisions of which the Division of Health is one. The creating act states that "All powers and duties heretofore under administration and control of the State Board of Health, except the examining and licensing of persons, shall henceforth be under administration and control of the department of Public Health and Welfare and shall be assigned to the Division of Health within the department together with all other powers and duties which may herein or hereafter be assigned.* * * *"

Thus we see that by these successive acts quoted above the State Board of Health has become the Division of Health, but that it has in these successive processes carried with it the powers and duties set forth in Section 9761, supra, one of which duties is:

"* * *Suitable apartments shall be provided by the custodian of the capitol for the bureau of vital statistics and the state board of health*in the state capitol at Jefferson City, which shall be properly equipped with fireproof vault and filing cases for the permanent and safe preservation of all official records made and returned under this article." *(Now Division of Health.)

It will be seen therefore that there is imposed upon the present Division of Health the duty to permanently preserve all official records of that department.

The next question which we have to decide is whether these applications for narcotic licenses are "official records." If they are, then, according to the foregoing, they are permanent records and cannot be destroyed. If they are not official records then the reverse is true. In seeking guidance upon the above we would call your attention to the case of Cohn v. U. S., 258 Fed. 355, which upon this point says:

"Official means of or pertaining to an office or public trust; derived from the proper office or officer or from the proper authority."

Certainly these applications for a narcotic drug license are "of or pertaining to" the office of the Division of Health.

Against, the laws of Missouri consider that a record which could be offered as evidence in a trial is a "documentary record." Bailey v. Metropolitan Life Ins. Co., 115 S.W.(2d) 151. Certainly there could be no doubt that these applications for narcotic licenses could be offered as evidence in a trial, and from this fact we draw, by analogy, the conclusion that these applications are "documentary records."

We would call your further attention to the case of State ex rel. Kavanaugh v. Henderson, 169 S.W.(2d) 389, which states:

"In all instances where, by law or regulation, a document is required to be filed in a public office, it is a public record and the public has a right to inspect it. 53 Corpus Juris, Section 1, Pages 604 and 605; Clement v. Graham, 78 Vt. 290, 63 A. 146. Ann Cas. 1913E, 1208; Robison v. Fishback, 175 Ind. 132, 93 N.E. 666, L.R.A. 1917B, 1179, Ann. Cas. 1913B, 1271; State Ex rel. Eggers v. Brown, 345 Mo. 430, 134 S.W.(2d) 28.

This, it seems to us, is the nearest indication as to whether these applications are official records. There is no written regulation requiring these applications to be filed in the office of the Division of Health. However, that is one of the unwritten customs and regulations of the Division of Health since its inception and was one of the State Board of Health's throughout its whole existence. Without the filing of these applications it would be manifestly impossible to properly transact this portion of the business of the Division of Health. The application itself states; "the undersigned, hereby makes application for a license to engage in the business of manufacturing, wholesaling, retailing and/or dispensing of narcotics in accordance with the laws of Missouri, Art. VI, Chapter 57, R. S. Mo. 1939. The license itself states:

"The party named on the front of the license has formally complied with the provisions of the Narcotic Act, Chapter 57, Article 6, R. S. 1939, and acts amendatory thereto, in making application for this permit. Licensee is hereby permitted to deal in narcotics subject to the conditions prescribed by law. This license

is not transferable on change of ownership of business, nor may narcotics be dealt in at any place of business other than the place described on face. This license is subject to revocation upon failure to comply with any of the rules and regulations prescribed by the Statutes or by the Division of Health or failure to comply with the Federal Narcotic Act."

From the above it would seem plain that the filing of these applications is required in the public office of the Division of Health and that, according to the Kavanaugh case, makes it a "public record." It is obvious that a "public record" is an "official record," and so we reach the conclusion that these applications for a license to sell narcotic drugs are official records and, according to Section 9761, which is still applicable, are permanent records and cannot be destroyed.

Your second question is:

"If it is not permissable to destroy these old records, then will it be permissable to microfilm the old application records and destroy the original application?"

In regard to the above, we would call your attention Sections 1, 2 and 4, found in pages 1427-1428, Laws of Missouri, 1945, which state:

"Section 1. Records may be photographed, microphotographed, photostated, or reproduced on film .-- The head of any business or the head of any state, county or municipal department, commission, bureau or board may cause any or all records kept by such official, department, commission, bureau, board or business to be photographed, microphotographed, photostated or reproduced on film. Such film or reproducing material shall be of durable material and the device used to reproduce such records on such film or material shall be such as to accurately reproduce and perpetuate the original records in all details.

"Section 2. Such copy to be considered an original record. -- Such photostatic copy, photograph, microphotograph or

photographic film of the original records shall be deemed to be an original record for all purposes, and shall be admissible in evidence in all courts or administrative agencies. A facsimile, exemplification or certified copy thereof, shall, for all purposes recite herein, be deemed to be a transcript, exemplification or certified copy of the original.

"Section 4. Disposal or destruction of such records or papers .-- Whenever such photostatic copies, photographs, microphotographs or reproductions on films shall be placed in conveniently accessible files and provisions made for preserving, examining and using same, the said head of a state department, commission, bureau or board, county office or department, city office or department may certify those facts to the Governor, or to the county court or to the mayor of a municipality, respectively, according to their status as subdivisions of government, who shall have the power to authorize the disposal, archival storage or destruction of such records or papers."

From the above it is clear that all public records (including those of the Division of Health) may be microfilmed, and that records so microfilmed are to be considered as being original records. Following the microfilming of such records the head of a department may certify such fact to the Governor, who, by the authority vested in him by Section 4, above quoted, may authorize the destruction of the original records which have been microfilmed.

CONCLUSION

It is the conclusion of this department that applications for a license to sell narcotic drugs are permanent records and cannot be destroyed.

It is the further conclusion of this department that such applications may be microfilmed, and that fact certified to the Governor, who may order the original records destroyed.

APPROVED:

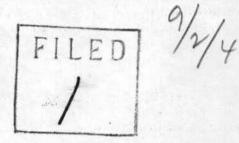
Respectfully submitted,

HUGH P. WILLIAMSON Assistant Attorney General · HEALTH HOTELS

) Saly hotels of single buildings with ten or more .) rooms required to be licensed. License fee may not LICENSES) be prorated.

August 30, 1949

Dr. C. F. Adams Acting Director Division of Health and Welfare Jefferson City, Missouri



Dear Sir:

This is in reply to your request for an opinion on three different questions which we will answer in order.

I.

Under the Hotel Inspection Law, Section 9931.

"May we assume that a proprietor is operating a hotel under this Section when they are advertising the establishment as such by roadside signs or signs located near the establishment, even though said establishment does not consist of ten rooms."

Section 9931, R. S. Missouri, 1939, reads as follows:

"That every building or other structure, kept, used, maintained, advertised or held out to the public to be a place where sleeping accommodations are furnished for pay to transient or permanent guests, in which ten or more rooms are furnished for the accommodation of such guests. whether with or without meals, shall for the purpose of this article be deemed a hotel, and upon proper application the food and drug commissioner shall issue to such above described business a license to conduct a hotel: Provided, that it shall be unlawful for the owner of any such building or other structure to lease or let the same to be used as a hotel until the same has been inspected and approved by the food and drug commissioner." You will note that Section 9931, supra, sets out very distinctly a definition of what establishments are to be deemed a hotel for the purpose of the article, which is basically inspection by the Division of Health. Section 9931 very clearly states that the building or structure must consist of ten rooms in order to be classed as a hotel. Certainly, with such a clear definition, all those establishments consisting or less than ten rooms would not be subject to the provisions of the section.

From a reading of the statute, it can be seen that the Legislature considered that a building might be advertised as a place where sleeping accommodations are furnished for pay, yet, it very carefully distinguished between small operators and those whose establishment consisted of ten or more rooms.

II.

"1. Under the Hotel Inspection Law, Section 9931.

"May we assume that an establishment is operating a hotel when two buildings are located adjacent to each other and separated only by a few feet and are operated together as a unit, but each building contains less than ten rooms. In this particular case there may or may not be any advertisement of rooms or as a hotel. The two buildings are operated by the same individual."

Section 9931 provides for the licensing and inspection of "Every building or other structure, kept, used, maintained, advertised or held out to the public to be a place where sleeping accommodations are furnished for pay to transient or permanent guests, in which ten or more rooms are furnished for the accommodation of such guests..."

You will note that Section 9931 does not use the plural in connection with the word, "building", nor in connection with the word, "structure." It is a rule of statutory construction that words and phrases shall be taken in their plain or ordinary and usual sense. In Webster's New International Dictionary, Second Edition, the word "building" is defined as follows: "that which is built; specif.:

a As now generally used, a fabric or edifice, framed or constructed, designed to stand more or less permanently, and covering a space of land, for use as a dwelling, storehouse, factory, shelter of beasts, or some other useful purpose."

We are unable to find an instance wherein the singular of "building" has been given a meaning indicating more than one. The word "structure" is defined in Webster's New International Dictionary, Second Edition, as: "Something constructed or built, as a building, a dam, a bridge; esp., a building of some size; an edifice."

Thus, in the ordinary and usual sense, "building" and "structure" are more or less synonymous. Under the word, "building" in Webster's, supra, it is said, "building, edifice, structure agree in meaning, but differ slightly in application....Structure retains more frequently than the others the sense of something constructed, often in a particular way; as, a tumble-down structure, a modern steel structure. Like edifice, structure is often used of buildings of some size or magnificence;...." Thus, we see that neither of the words used in Section 9931, in their singular form, convey the meaning of more than one.

The factual situation in the case of Porter v. Tureen, 68 Fed. Supp. 214, was very similar as in the case now before us. The question before the court was whether or not the operation of the defendant, Tureen, in the rental of certain property, fell within a rent regulation for housing. Tureen rented property located at 4250 and 4260 Lindell Blvd., City of St. Louis, to a tenant who operated the rented property as a rooming house. The property at 4250 Lindell has twenty rooms and at 4260 Lindell seven rooms on the third floor. There are two apartment houses between 4250 and 4260 Lindell. The premises had been sold a number of times, and each time as a unit. A regulation of the housing expeditor provided for an exemption as follows at 1.c. 215:

"This regulation does not apply to the following:

"'(4) Structures in which more than 25 rooms are rented or offered for rent. Entire structures or premises wherein more than 25 rooms are rented or offered for rent by any lessee, sublessee or other tenant of such entire structure or premises: * **"

The price administrator contended that because the rooming house business was carried on in two structures, and neither structure has over 25 rooms, the rent regulation applied. The court decided the case on the interpretation of the term, "premises," but in its decision

it was stated at 1.c. 215:

"It is apparent that the term 'structure' will not include the operation of the defendant * * *."

Thus, since the definition of the word, "hotel" for the purposes of Section 9931 is dependent upon a building or structure containing more than ten rooms, it is apparent that the establishment which you describe in your request should not be considered a hotel under said section.

III.

"2. Under the same Hotel Inspection Law, Section 9932 and Section 9933.

"In the event that for some reason such as failing to provide adequate fire prevention measures or provide adequate fire escapes, a hotel is not licensed until these Items are complied with, if during the interim while awaiting correction the hotel should be sold, shall it be legal to require the new owner to pay the full year's license fee as set up under Section 9933, or is it permissable to pro rate the license fee on a monthly basis and charge the new owner only for the remaining year in which he will operate the hotel or rooming house. If it is necessary to pay the full year's fee or license, is it possible to legally collect such fee from the former owner of the establishment even though he is not the owner at the time the statement is presented.

"We would like to know who is responsible legally for the payment of this annual license under such circumstances."

Section 9932, R. S. Missouri, 1939, reads as follows:

"That on or before June 1st, 1917, and

each year thereafter, every person, firm or corporation now engaged in the business of conducting a hotel, and every person, firm, or corporation who shall hereafter engage in conducting such business shall procure a license for each hotel so conducted or proposed to be conducted. Each license shall expire on the 31st day of May next following its issuance. No hotel shall be maintained and conducted in this state after the taking effect of this law without a license therefor. Licenses may be transferred upon the payment of a fee of one (\$1.00) dollar to the food and drug commissioner, who shall then issue a transfer to the new proprietor for the unexpired term of said license."

Section 9933, R. S. Missouri, 1939, provides for the amounts to be paid for the license and further provides that said amounts ".... shall be paid to the food and drug commissioner before said license is issued...."

In 53 C.J.S., at page 665, the rule concerning prorating of a license fee is stated as follows:

" * * * In the absence of a provision for a pro rata license, a person taking out a license must pay the full amount prescribed even though he takes out his license after the beginning of the license year, * * *"

In the case of Botes v. City of Franklin, 262 S.W. 282, a license was issued in October, 1920, by the city clerk, who had authority to issue such a license, for a term not beyond the first Monday in the following January. The court applied the above cited C. J. rule from 25 Cyc. 627. Section 9932 does not provide for a pro rata license, and the language used therein indicates that the Legislature was aware that the license might issue any time during the term, as witness the language, "each license shall expire on the 31st day of May next following its issuance."

The Legislature further provided that licenses could be transferred and new licenses issued for the unexpired term of a

license. However, that is not our case. We believe that it is necessary that you require the payment of the full year's license fee before a license may be issued.

Further, we do not believe that it would be legally possible to collect the fee from the former owner of the establishment since no such remedy has been provided. Collection is enforced by refusing to issue a license before the fee is paid. The proper approach would have been for the Division of Health to enjoin the former owner from operating the hotel before properly licensed.

CONCLUSION.

Therefore it is the opinion of this office that:

- (1) A statute defining a hotel as a building containing ten or more rooms does not apply to an establishment consisting of less than ten rooms;
- (2) a statute defining a hotel as a building or other structure containing ten or more rooms does not apply to an establishment where two buildings are located adjacent to each other, but separated when both buildings contain less than ten rooms;
- (3) it is not permissible to prorate the license fee for the conducting of a hotel. The person, firm or corporation seeking the license must pay the full amount provided for in the statute.

Respectfully submitted,

APPROVED:

JOHN R. BATY Assistant Attorney General

J. E. TAYLOR Attorney General

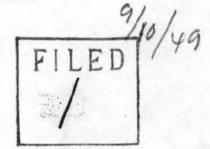
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MOTOR VEHICLES:

Provision for refund of motor vehicle registration fee, found in Section 8369b, Mo. R.S.A., Laws of Missouri, 1947, page 382, is constitutional. Refund applies to all motor vehicles regardless of period for which registered.

September 9, 1949

Mr. John H. Allison, Supervisor Motor Vehicle Registration Division of Collection Department of Revenue Jefferson City, Missouri



Dear Sir:

Reference is made to your request for an official opinion of this office, reading as follows:

"We respectfully request an Opinion, concerning Refunds, Section 8369-B, Permanent-Staggered Registration, House Bill #273, Lines 43 to 49 inclusive.

"Does Refund apply only to Vehicles registered for a period exceeding twelve (12) months. Or, is it applicable to all Applicants, upon cessation of operation of the Vehicle and the return of the License Plate."

The provision for refund of motor vehicle registration fees referred to in your letter of inquiry appears as a part of Section 8369b, Mo. R.S.A., Laws of Missouri, 1947, p. 382. This section, insofar as pertinent to your inquiry, reads as follows:

"(1) Motor vehicles not previously registered in Missouri and operated for the first time on the public highways of this state after January 1, 1949, shall be registered for a full twelve month period without regard for the varying period of registration provided for during the period of change-over to the staggered registration system, subject, however, to the following provisions: (1) Notwithstanding any requirement to the contrary, motor vehicles may be initially registered for less than a twelve

month period at the Director's option, when in his judgment such fractional registration period shall tend to fulfill the purpose of the monthly series registration system. (2) Upon expiration of the initial fractional registration periods, motor vehicles so registered shall thereafter be registered for twelve month periods as provided in Section 8369a. (3) Whenever the Director shall determine from an increase or decrease in the number of registrations of all types of motor vehicles in any given month, that the volume of clerical work of registration of all types of motor vehicles in such month has become so disproportionate to the volume of work in the remaining registration periods as to render the system burdensome or inefficient, he is authorized and empowered to change the registration period of such number of motor vehicles as may be necessary to increase or reduce the volume of registration in one or more periods by advancing the renewal date and shortening the registration period of such motor vehicles. Such shifting of registration periods shall be accomplished by notifying the registrants of the change, giving them credit for that portion of the registration period not yet elapsed. In such instances the Director shall order the registrant to surrender the license plate and registration certificate held by him and shall assign and issue, without cost to the owner, a new plate and registration certificate designating the new registration expiration date. (4) When the owner of a motor vehicle moves the vehicle to another state, he shall return the license plate to the Director of Revenue within ninety (90) days or upon the expiration of the period of reciprocity granted by the new state of residence; or if the owner of a motor vehicle ceases to operate the motor vehicle in Missouri he shall return the license plate to the Director of Revenue within ninety (90) days. The owner of said motor vehicle in each case shall be entitled to a refund to be computed on the basis of one-twelfth of the full year's registration fee prescribed for such vehicles, multiplied by the number of months, not to exceed five, which have not expired at the time of his removal or cessation of operation." You will note that subparagraph 4 exists as a qualification or proviso in said section 8369b. The Legislature did not make this proviso as clear as they might have. Prior to this section, which was enacted by the 1947 Legislature, we had no provision for the refund of registration fees upon the return of the license plate or plates. Now we have the permanent use of license plates upon motor vehicles as stated in the title of the Act, that is, permanent staggered registration.

The entire Act must be construed as a whole because it was passed as a whole, and not in parts or sections, and was enacted for one general purpose or intent, and that was to have staggered registration of motor vehicles and permanent use of license plates.

Consequently, the provision in regard to refunds should be construed in connection with every other part or section of the Act so as to produce a harmonious whole. (See Sutherland's Statutory Construction, Section 4703.) The presumption is that the Legislature had a definite purpose in every enactment and has adopted and formulated the subsidiary provision in Section 8369b in harmony with that purpose, so the intent or purpose of the whole Act shall control in construing any proviso or any section. A proviso should be interpreted consistently with the general Legislative intent.

Our Supreme Court in Bowers v. Mo. Mutual Association, 62 S.W. (2d) 1058, 333 Mo. 492, stated the rule as follows:

"The section as reenacted and now appearing in the statute book is not as clearly worded as it might be, but all of its provisions must be considered as well as its evident purpose, and its proper construction gathered from the whole, giving due effect to all marts thereof. Where certain terms of a statute are ambiguous, we are at liberty to go to the title of the act as a clue or guide to the intention of the legislature. The Laws are passed in a spirit of justice and for the public welfare and should be so interpreted if possible to further those ends, and avoid giving them an unreasonable effect." Subsection 1 and subsection 2 of Section 8369b clearly apply to motor vehicles not previously registered in Missouri and operated for the first time after January 1, 1949. Subsection 3 of said Section 8369b would not operate successfully if it did not apply to all motor vehicles.

It could be argued by reasonable men that Subsection 4 of said Section 8369b only applies to the registrants who register for the first time under the first and main clause of said Section 8369b because said first or main clause states that it is "subject, however, to the following provisions," and that said Subsection 4 is a proviso, and that it only relates to the section in which it is found and therefore would be unconstitutional by favoring one class of motor vehicle owners over another. This would be the correct construction under the old rules, but Sutherland's Statutory Construction, Section 4934 says: "Originally the proviso was said to restrict only the section to which it was attached, the modern rule applies the proviso to all sections of the Act if it can be determined that that was the legislative intent."

State v. Reagan, 108 S.W. (2d) 398, 1.c. 400 quotes the rule of construction from 59 C. J., page 495, Section 595, to be:

"'Provided always that the interpretation is reasonable and not in conflict with the legislative intent, it is a cardinal rule of construction of statutes that effect must be given, if possible, to the whole statute and every part thereof.' * * *"

This cardinal rule also applies to provisos according to 59 C.J., page 1088, Section 639.

State ex rel. v. City of St. Louis, 73 S.W. 623, 1.c. 629; 174 Mo. 125, says: "If the context requires, the proviso may be construed as a limitation extending over more than what immediately precedes, or may amount to an independent enactment."

Castilo v. State Highways Commission, 279 S.W. 683, l.c. 677; 312 Mo. 244, says: "Appellants persist in the erroneous view that a proviso may not confer power as well as impose restrictions." The court in this case construed the proviso as an independent grant of power to the Highway Commission.

59 C.J., page 1091, Section 641 says of provisos,: "Where from the language employed it is apparent that the Legislature intended a more comprehensive meaning; it must be construed to assume the function of an independent enactment."

Subsection 4 of said Section 8369b states: "When the owner of a motor vehicle * * *. " The entire language of this subsection shows that is applies to any owner of a motor vehicle. The fact it is a subsection, or proviso to the first or main clause in Section 8369b is not the controlling factor. The whole Act must be studied and no other section of the Act pro-. vides for a refund. It would be unjust for a motor vehicle owner, subject to the provisions of Section 8369a, who had to pay for seventeen months registration of his motor vehicle, to be forced to lose more than one year's license fee if he moved to another state, or ceased to operate the motor vehicle before the seventeen months had expired. That may be the reason for the five months limit on the amount of the refund, but we cannot speculate upon the reason for the limit. But the provision for refund is so worded that if it was given a separate section number it would clearly apply to all motor vehicle owners. The terms for refund are clear and if the motor vehicle owner qualifies under the provisions of said subsection 4 of Section 8369b as to moving the vehicle to another state and returning the license plates to the Director of Revenue within the time specified, or if the owner ceases to operate the motor vehicle in Missouri and shall return his license plate to the Director of Revenue within the time limit then he is entitled to a refund according to the provisions of said section.

The provision for refund is applicable to all owners of license plates who qualify as stated in said subsection 4 of Section 8369b regardless of the period for which their vehicle was registered. They cannot recover a refund for more than the unexpired term of their registration, nor more than five months if the unexpired term of their registration is more than five months.

CONCLUSION

Therefore, we are of the opinion that the refund provision relating to motor vehicle registration fees found as a part of Section 8369b, Mo. R.S.A., Laws of Missouri, 1947, p. 382, is

constitutional and applies to all owners of motor vehicles registered with your department regardless of the period of time for which they are registered, and the refund upon the return of the license plate shall be made if the owner qualifies under the provisions of said Subsection 4 of Section 3869b, Laws of Missouri, 1947, p. 382.

Respectfully submitted,

STEPHEN J. MILLETT Assistant Attorney General

APPROVED:

J. E. TAYLOR Attorney General

SJW:mw

HEALTH: Division of Health cannot examine records of manufacturers, wholesalers or distributors of carbonic gas to aid in collection of inspection fee on fountain syrups, flavors or extracts.

September 22, 1949

C. F. Adams, M. D. Acting Director Division of Health Jefferson City, Missouri



Dear Sir:

Your letter at hand requesting an opinion of this department which reads:

"This Division would like to have an official opinion on the following:

"1. Under the Beverage Inspection Act, Section 3, last two sentences.

"(a). This Section indicates that an inspection fee be paid equal to three cents per pound of carbonic gas used in the manufacture or concoction of such beverages or drinks. It is our desire to set up a system of collecting this tax by mail and in order to simplify this procedure it will be necessary to obtain from the distributor, in most cases, and in some cases the manufacturer, a list of the establishments to which he has sold or distributed gas drums together with the size of the container and the number supplied. May we legally under Section 6 or Section 9, or any other section, have the authority to examine the records of the distributor or wholesaler of carbonic gas to determine the name of the consignor and consignee, date, place received, number of containers and size of containers supplied?"

The section to which you refer providing for the payment of an inspection fee based on the amount of carbonic gas used in the manufacture or concoction of beverages or drinks is Section 3, Laws of Missouri, 1943, page 586, Section 9980.3, Mo. R.S.A., which provides:

"A license fee of one dollar (\$1.00) shall be paid by each manufacturer of soft drinks or beverages required to be licensed under the provisions of this Act; and in addition thereto an inspection fee shall be paid by wholesale manufacturers of soft drinks or beverages of three tenths cent for each gallon of such beverage manufactured or sold in this state, but the fees for inspection shall not exceed four cents per month per case of twenty-four bottles of such manufacturer's bottling capacity, as determined by the rated capacity of the machines therein for an eight hour day as rated by the manufacturer of such machines; and for inspection of all fountain syrups, flavors or extracts used in the manufacture or concoction of beverages for retail sales, not otherwise inspected, an inspection fee shall be paid equal to three cents per pound of carbonic gas used in the manufacture or concoction of such beverages or drinks. All fees received shall be paid into the state treasury."

(Underscoring ours.)

The first part of the statute provides for the payment of an inspection fee by the wholesale manufacturer of soft drinks or beverages on the manufactured or finished product. However, the portion of the statute underscored above provides for an inspection fee to be paid for the inspection of certain ingredients used in the manufacture or concoction of beverages for retail sales, i.e., fountain syrups, flavors and extracts. The fee to be paid is computed on the basis of three cents per pound of carbonic gas used in the manufacture of the beverage or drink.

We are aware that the Division of Health would be aided in the collection of the inspection fee in the latter instance if it could examine the records of the manufacturers, distributors or wholesalers of carbonic gas and obtain the information set out in your letter.

You inquire if Sections 6 or 9 (9980.6 and 9980.9, Mo. R.S.A.), of the Beverage Inspection Act or any other section of the Act would permit you to examine the records of the manufacturers, distributors or wholesalers of carbonic gas in order to obtain the designated information.

At this time we wish to point out that in the various sections of the Beverage Inspection Act where the term "state board of health" is used, the term "division of health" shall be read in its place. Thus, Section 9759.13, Mo. R.S.A., provides that "in all laws of Missouri, and orders and findings issued thereunder, wherever the term state board of health is used, the term division of health shall hereafter be substituted and understood."

Section 9980.6, Mo. R.S.A., requires railroads, express or transportation companies to furnish to the Division of Health a duplicate bill of lading covering the shipments of "soft drinks or beverages, syrups, extracts or flavors." Thus, the statute provides:

"Every railroad, express or transportation company shall, when requested, furnish to the State Board of Health of Missouri a duplicate bill of lading or receipt showing the name of the consignor and consignee, date, place received, destination and quantity of soft drinks or beverages, syrups, extracts or flavors received by them for shipment to any point within this state. Upon failure to comply with the provisions therein, said railroad, express or transportation company shall pay to the State of Missouri the sum of fifty dollars (\$50.00) for each and every failure, to be recovered in any court of competent jurisdiction. The State Board of Health is hereby authorized and empowered to sue in its name at the relation and to the use of the state and any sums thus collected shall be paid into the state treasury."

We believe it is apparent that there is nothing in the above quoted statute authorizing the examination of records of manufacturers, distributors or wholesalers of carbonic gas or nothing which would require them to furnish the desired information.

Section 9980.9, Mo. R.S.A., provides:

"All manufacturers, wholesalers and dealers in bottling soft drinks, beverages, syrups, flavors or extracts shall from and after the passage of this Act keep an accurate

account of their sales and make a report under oath at the end of each month to the State Board of Health with a remittance to cover all sales for the month, unless such manufacturer or bottler pays the maximum inspection fee based on the bottling capacity of such manufacturer's or bottler's plant pursuant to Section 3 of this Act. The books of such manufacturers, bottlers, wholesalers or dealers shall at all times be open to examination and inspection by the State Board of Health and its officers and agents."

Again there is nothing in the above statute which is directed at the manufacturers, wholesalers and dealers in bottling soft drinks, beverages, syrups, flavors or extracts which would authorize the examination of records of manufacturers, wholesalers or distributors of carbonic gas.

The only other section of the act to be considered which might afford a means for the Division of Health to obtain the desired information is Section 9980.16, Mo. R. S.A., which provides:

"The State Board of Health of Missouri may make suitable rules and regulations for the carrying out of the provisions of this Act."

In other words, under the authority of the above section could the Division of Health, in carrying out the provisions of the act, make a rule or regulation that would compel the manufacturers, wholesalers or distributors of carbonic gas to submit their records for examination so that the desired information could be acquired.

The scope and extent of the power of administrative authorities to enact rules and regulations under such a statute as above quoted is not unlimited.

Thus, in Volume 42, Am. Jur., Section 53 at pages 358-359, the limitation or restriction on the power of administrative authorities to enact rules and regulations is stated as follows:

" * * * Since the power to make regulations is administrative in nature, legislation may not be enacted under the guise of its

exercise by issuing a 'regulation' which
is out of harmony with, or which alters,
extends, or limits, the statute being
administered, or which is inconsistent
with the expression of the lawmakers' intent in other statutes. The administrative
officer's power must be exercised within
the framework of the provision bestowing
regulatory powers on him and the policy
of the statute which he administers. * * * "

Under the above pronouncement of law, an administrative officer or body cannot make a rule or regulation that alters, enlarges, extends or limits a legislative enactment.

Regarding the question of the power to make laws, we point out that the organic law of this state (Article III, Section 1, Constitution of Missouri, 1945) vests the legislative power or the power to enact laws in the General Assembly, and it is a settled maxim in constitutional law that the power conferred upon the Legislature to make laws cannot be delegated by that branch of government to any other body or authority. It has been so held by our Supreme Court in Ex parte Cavanaugh vs. Gerk, 313 Mo. 375, State ex rel. Field vs. Smith, 49 S.W. (2d) 74, 329 Mo. 1019. In the latter case, the court at Mo. 1.c. 1026-1027, said:

"'One of the settled maxims in constitutional law is, that the power conferred upon the Legislature to make laws cannot be delegated by that department to any other body or authority. Where the sovereign power of the State has located the authority, there it must remain; and by the constitutional agency alone the laws may be made until the Constitution itself is changed. The power to whose judgment, wisdom and patriotism this high prerogative has been entrusted cannot relieve itself of the responsibility by choosing other agencies upon which the power shall be devolved, nor can it substitute the judgment, wisdom, and patriotism of any other body for those to which alone the people have seen fit to confide this sovereign trust. (1 Cooley on Cons. Limitations, 224.)

"The Legislature may not delegate the power to enact a law, or to declare what the law

shall be, or to exercise an unrestricted discretion in applying a law; but it may enact a law complete in itself designed to accomplish a general public purpose, and may expressly authorize designated officials within definite valid limitations, to provide rules and regulations for the complete operation and enforcement of the law within its expressed general purpose. * * **

Referring again to the rule-making power of administrative bodies, and particularly the authority of boards of health to make rules and regulations, the following appears in Vol. 39, C.J.S., at pages 823-824:

"Boards of health have no inherent legislative power, they cannot, by their rules and regulations enlarge or vary their powers, and any rule or regulation which is inconsistent with such law or which is antagonistic to the general law of the state, is invalid. * * * "

In the case of Bloemer vs. Turner, 281 Ky. 832, 137 S.W. (2d) 387, a dog food manufacturer sought injunctive relief against the Director of the Kentucky Agriculture Experiment Station who had made a regulation regarding the labeling of canned dog food. The labeling statute required the labels on the containers of such food to bear some five different things. such as the net weight, name and trademark, the ingredients from which the food was compounded, etc. Under another statute giving the Director authority to make rules and regulations in carrying out the provisions of the act, a regulation was made requiring the manufacturers of canned dog food to put on the label that the can contained 74% water. Objection was made to this on the ground that it would be misleading to the public. It was argued that the statute giving the Director authority to make regulations did not give him the power he sought to exercise in that he would be extending the labeling statute in its requirements and that such would be an invalid delegation of legislative power. In holding that the regulation was invalid, the court, at S.W. (2d) 1.c. 391, 392, said:

"Reading the section in isolation, appellees are met with the absence of any sort of standard or guide. No one could claim such vast and unrestricted governmental power as that would import. Reading the section in connection with other parts of

the statute, as must be done, the appelless are met with the specific statement of the legislature that the percentages of only the qualities of fat and protein of the products are to be put on the labels. * * *

"The General Assembly deemed it to be legislation to prescribe the contents of the label. It did so itself. We suppose no one would contend that the Director of the Agriculture Experiment Station, or any other agency, could detract from the stipulated provisions, e. g., rule that the net weight of the contents of the package need not be printed on the label. If he may not by regulation subtract, then he may not by regulation add. To construe the act as appellees contend would be to hold that it was the intent of the General Assembly to delegate an attribute of sovereignty to the individual director by authorizing him to alter or amend a law at will."

A careful reading of the Beverage Inspection Act, Sections 9980.1 to 9980.17, and also the title of the Act, shows that its purpose is to provide for the licensing and regulating of the manufacture and bottling of beverages and soft drinks, except malt beverages, and to provide for the inspection of said beverages or soft drinks manufactured or sold within the state. There is nothing in the Act purporting to regulate or to exercise any degree of control over the carbonic gas industry.

In Section 9980.6 of the Act, the Legislature has required railroads, express or transportation companies to furnish the Division of Health certain information by submitting duplicate bills of lading or receipts.

Section 9980.9 of the Act requires all manufacturers, wholesalers and dealers in bottling soft drinks, beverages, syrups, flavors or extracts to furnish monthly reports to the Division of Health, and further provides that their books shall at all times be open to examination and inspection by the Division of Health, its officers and agents.

However, no provision of the Act requires similar reports to be made by the manufacturers, wholesalers or distributors of carbonic gas or requires their books to be open for examination and inspection; nor is such a legislative intent manifested in the Act. Consequently, we believe that should the Division of Health make a regulatory rule to be imposed on the manufacturers, wholesalers or distributors of carbonic gas to require them to present reports and submit their books to examination and inspection so that the desired information could be obtained, it would be extending the provisions and the scope of the Act. To do so would constitute an unauthorized exercise of legislative power not delegated to the Division of Health. It was not the intent of the Legislature, nor could it have done so in giving the Division of Health authority to make rules and regulations to delegate to it any attribute of sovereignty reserved to the Legislature.

CONCLUSION

It is, therefore, the opinion of this office that the Division of Health, in collecting the inspection fee on fountain syrups, flavors or extracts used in the manufacture or concection of beverages for retail sales, as provided in Section 9980.3, Mo. R.S.A., would not be authorized under any provision of the Beverage Inspection Act to compel manufacturers, wholesalers or distributors of carbonic gas to submit their records for examination so that the Division of Health could obtain desired information relating to the shipment of carbonic gas.

Respectfully submitted,

RICHARD F. THOMPSON Assistant Attorney General

APPROVED:

J. E. TAYLOR Attorney General

RFT:VLM

MOTOR VEHICLES:

Financial Responsibility Act applies where judgment is in favor of bailor of automobile against bailee who damaged same through negligent operation.

September 22, 1949

Mr. John H. Allison Supervisor, Motor Vehicle Registration and Drivers' Licenses Department of Revenue Jefferson City, Missouri



Dear Sir:

We are in receipt of your request for an opinion, which request is as follows:

"The facts are as follows, according to the Answer and Counter-Claim of the Defendant. This Department has never seen the Petition. We quote:

"'About July 6, 1948, Charles W. and Dorothy Maple delivered to the DeGrendele-McClintock Company, a Corporation, 304 South Kirkwood Road, a 1948 Willy Station wagon for repairs and, at the Plaintiff's request, said station wagon was repaired and the costs for said repairs was \$29.12. delivery and request for repairs on the said station wagon was predicated upon the Defendant's delivering to the Plaintiff an automobile for Plaintiff's sole use and benefit while their aforesaid Willys Station wagon was being repaired. The Defendant entrusted to the Plaintiff a 1939 Chrysler automobile which, they claim, was in excellent mechanical and salable condition, for the sole use and benefit of the Plaintiff while their Willys automobile was being repaired, with the understanding that the Plaintiffs were to return the said 1939 Chrysler automobile to Defendants in the same condition as soon as Defendants repaired Plaintiff's automobile.

"'Defendant states that Plaintiffs did not return the 1939 Chrysler automobile Defendant permitted Plaintiffs to use, in the same condition but, on the contrary, Plaintiffs caused said automobile to be damaged beyond repair.'

"The case was tried in Division #4 of the Circuit Court of St. Louis County and nine jurors returned a verdict in favor of the Defendants, in the sum of \$350.00.

"The Defendants, DeGrendele-McClintock, Incorporated, through their attorney, want this Department to revoke the Plaintiffs' license to run a car or truck and, under the provisions of the Motor Vehicle Safety Responsibility Law, we do not think that comes within our jurisdiction, as our contention is—the Defendants were Bailors and the aforesaid damage to said Chrysler automobile does not come within the provisions of the Safety Responsibility Law; hence our request for an opinion."

The facts as presented indicate that the damaged automobile was the subject of a bailment. Litigation followed the return of the damaged automobile by the bailee, the result of which was a judgment in favor of the bailor, which judgment remains unsatisfied. The question is whether or not this is such an unsatisfied judgment as requires the commissioner to act under the Motor Vehicle Financial Responsibility Act.

Section 4(a) of this act, Laws of Missouri, 1945, page 1210, reads as follows:

"The commissioner also shall suspend the license and all registration certificates or cards and registration plates issued to any person upon receiving authenticated report, as hereinafter provided, that such person has failed for a period of 30 days to satisfy any final judgment in amounts and upon a cause of action, as hereinafter stated."

Section 1 of the act, Laws of Missouri, 1945, page 1209, defines the word "judgment" for the purpose of the act to mean:

"'Judgment.' Any judgment which shall have become final by expiration without appeal of the time within which an appeal might have been perfected, or by final affirmation on appeal rendered by a court of competent jurisdiction of any state or of the United States, upon a cause of action arising out of the ownership, maintenance or use of any motor vehicle, for damages, including damages for care and loss of services. because of bodily injury to or death of any person, or for damages because of injury to or destruction of property, including the loss of use thereof, or upon a cause of action on any agreement or settlement for such damages."

This section therefore provides that any final unsatisfied judgment upon a cause of action arising out of the use of any motor vehicle, for damages, is such a judgment as authorizes the commissioner to act under Section 4(a), supra.

Where the bailment and injury is such as is involved in this case, the gist of the bailor's cause of action is negligence, and negligence must be proved as the cause of the loss. See Oliver Cadillac Co. v. Rosenberg, 179 S.W. (2d) 476. Though the certified copy of the judgment in this cause indicates in no way the basis of recovery, an examination of the pleadings and the instructions given in this case clearly shows that it was the negligent operation of the automobile by the bailee which resulted in the damage to said automobile. Therefore, the judgment in this instance was upon a cause of action arising out of the use of a motor vehicle, and was such as authorizes the commissioner to suspend the bailee's license and registration certificate.

Section 8 of the act requires that only a certified copy of the judgment for damages be forwarded to the commissioner by the clerk of the court or the judge of the court if such court has no clerk. However, a judgment ordinarily will not indicate the nature of the cause of action upon which it was given. We therefore feel that it is proper for the commissioner, of necessity, to go outside the certified copy of the judgment in order to determine whether or not he has authority to act in that instance under the Motor Vehicle Financial Responsibility Act.

Conclusion.

It is, therefore, the opinion of this department that the Motor Vehicle Financial Responsibility Act is applicable in the case where the unsatisfied judgment is that in favor of the bailor of an automobile against the bailee who returns the automobile in a damaged condition, which damage arose out of the bailee's negligent operation of the automobile.

Respectfully submitted,

RICHARD H. VOSS Assistant Attorney General

APPROVED:

J. E. TAYLOR Attorney General

RHV:ml

HEALTH: Distinction between hotels and tourist camps for inspection purposes.

TOURIST CAMP:

October 6, 1949

16/14/49

Honorable C. F. Adams Acting Director Division of Health Jefferson City, Missouri



Dear Dr. Adams:

This is in reply to your request for an opinion, which reads as follows:

"This Division would like to have an official opinion as to a satisfactory definition between a tourist camp or court and a hotel.

"We have in this state a number of establishments which consist of ten or more rooms under one roof, which, according to existing laws, may be licensed either as a hotel or as a tourist camp. Some of these establishments prefer to be licensed as a tourist camp or courts, while others prefer to be licensed as hotels, therefore, we would appreciate an opinion designating the type of license such establishments should be issued."

The definition of buildings to be licensed as hotels is set out in Section 9931, R.S. Mo. 1939, as follows:

"That every building or other structure, kept, used, maintained, advertised or held out to the public to be a place where sleeping accommodations are furnished for pay to transient or permanent guests, in which ten or more rooms are furnished for the accommodation of such guests, * * * ."

Section 9955, R.S. Mo. 1939, provides for inspection and licensing of tourist camps and resorts, and reads, in part, as follows: "* * * all tourist camps, cabins or resorts of whatever kind kept, used, maintained or advertised or held out to the public to be a place where sleeping accommodations are furnished for pay to transient or permanent guests in which two or more cabins, whether in combination or under separate roofs, are furnished for the accommodations of guests.

Section 9931, supra, defines a hotel as a building in which ten or more rooms are furnished for the accommodation of guests.

Section 9955, supra, defines tourist camps, cabins or resorts as a place where sleeping accommodations are furnished, in which two or more cabins are furnished for the accommodation of guests. Therefore, in order for an establishment to be licensed as a tourist camp, or resort, there must be operated in connection therewith, at least two or more cabins.

Under date of August 30, 1949, this office rendered an opinion (Adams) in which it was concluded that Section 9931 did not apply to an establishment where two buildings are located adjacent to each other, but separated, when both buildings contain less than ten rooms. Therefore, it would seem that one of the main distinctions would be whether or not the establishment consisted of one building or two or more cabins.

However, a difficulty may well arise when the cabins or rooms are in combination and not under separate roofs. In these instances the physical structure of the establishment and nature of services rendered would have to be studied, so as to determine whether they contain the characteristics of a hotel or of a tourist camp or court.

It is a rule of statutory construction that words and phrases shall be taken in their plain or ordinary and usual sense. (Section 655, R.S. Mo. 1939; Kinyon vs. Kinyon, 71 S.W. (2d) 78, 230 Mo. App. 633.)

The problem for our determination is, which section, 9931 or 9955, applies to cases of establishments which may come under either classification. The Legislature has defined

only in general terms the meaning of the words "hotel" and "tourist camp". We are unable to obtain much help from the lexicographers, for, turning to Webster's New International Dictionary, Second Edition, we find the following definitions:

Hotel--"A house providing lodging and usually meals for the public, esp. for transients; * * * ."

Tourist-adj .-- "Of, pertaining to, suitable for, or serving, tourists; as a tourist * * * camp, or cabin; * * * ."

From these definitions we see that the one may be applied to the other, at least in the modern sense.

The St.Louis Court of Appeals had for consideration a case wherein the question was, "Is a tourist camp a hotel within the meaning of a statute permitting cities of the fourth class to license restaurants, taverns, hotels, public boarding houses, and numerous other specifically named businesses and occupations?"

In the case of Juengel et ux. vs. City of Glendale, 164 S.W. (2d) 610, the Court said, 1.c. 613:

"A hotel is defined as a house which is held out to the public as a place where all transient persons who come will be received and entertained as guests for compensation; or a house where travelers are furnished, as a regular matter of business, with food and lodging while on their journey; or a house where travelers are furnished with everything which they have occasion for while upon their way; or a place provided for the lodging and entertainment of travelers; or a place for the accommodation of travelers with food and lodging; or a place where transient guests are admitted to lodge, as well as one where they are fed and lodged: or a place where every well-behaved stranger or traveler, who is willing to pay reasonable rates for accommodation, is entitled to receive food, drink, and lodging; or

a place kept for the entertainment of travelers and casual or transient guests; or a place where the proprietor makes it his business to furnish food or lodging, or both, to travelers. It is not now essential to constitute a hotel that there should be provision for furnishing food or drink as well as lodging for the guests. Distinctive features of a hotel are that it receives transient guests and furnishes them with lodging. An essential characteristic of the business or occupation of keeping a hotel is that it shall be the regular business of the person so engaged. 32 C.J. 527, 528, 529; Bunn v. Johnson, 77 Mo. App. 596, loc. cit. 599; Metzler v. Terminal Hotel Co., 135 Mo. App. 410, loc. cit. 416, 115 S.W. 1037; City of St. Louis v. Siegrist, 46 Mo. 593; Kennedy v. City of Nevada, 222 Mo. App. 459, loc. cit. 467, 281 S.W. 56, loc. cit. 60.

"It is quite obvious that the business or occupation carried on by plaintiffs through their tourist camp has all the essential characteristics of the business or occupation of keeping a hotel. It would be strange indeed if the business or occupation of keeping a hotel conducted through the use of a single building should be subject to regulation while the same business or occupation conducted through the use of a group of buildings, such as a tourist camp, should be exempt from regulation. A tourist camp is none the less a hotel because the business or occupation is conducted through the use of a group of buildings rather than through the use of one. It thus appears that cities of the fourth class have power and authority to regulate tourist camps by virtue of express statutory grant.

"Plaintiffs contend, however, that section 1 of the ordinance under review here, defining a tourist camp, is out of accord with section 13091, article 7, chapter 93, R.S. 1929, Mo. St. Ann. Section 13091, p. 4152, defining a hotel as a building or other structure having ten or more rooms for the accommodation of guests, and that the ordinance for that reason is invalid. As to this contention it will suffice to say that the definition of a hotel as given in said section of the statute is expressly for the purpose of the article

in which it appears. It has no application or reference to a hotel as that term is used in the statute relating to cities of the fourth class."

From the above case it is seen that for certain purposes courts have determined that there is no distinction between a tourist camp and a hotel. However, as noted in the Juengel case, the court was not confronted with the definition contained in the present Section 9931. The definitions of a hotel by the court would also be applicable to many tourist camps.

A tourist camp has been defined by a court as follows:

"* * * A group of ten cabins on one fiftyfoot lot conducted as rental property where
overnight guests or guests for two or three
days or by the week were registered and accommodated speaks for itself and is what is
generally termed a tourist camp. * * * ."

(Cantieny vs. Boze, et al., 296 N.W. 491, 1.c. 493.)

However, it is apparent that none of the above aids are available for the determination of our present question. Since this is so, we must seek for ourselves some standard whereby establishments may be classified for the present purposes of licensing.

One of the commonest characteristics of a hotel which comes quickly to mind is that they have a common entrance, a common stairway and a common hallway giving access to the rooms available for lodging. Access to tourist camp rooms, or cabins, are through outside doors opening directly into the rooms; to commute from room to room one must go outside.

Hotels very generally consist of more than one floor in height. In this writer's observation at least, he has never seen a tourist camp with more than one floor, in other words, cabin upon cabin.

Hotels are generally located in the center of cities and towns, particularly near the business section. Tourist

camps are usually located adjacent to highways and may usually be found on the outskirts of cities and towns.

Hotels draw for their trade, not only transients traveling by motor car, but also those traveling in public conveyances. Because of their location, tourist camps draw their trade primarily and almost exclusively from those traveling by motor car.

Hotels furnish common garage space or on-street parking, while tourist camps generally provide parking facilities, very often enclosed, adjacent to the cabins, or common parking facilities on the property.

Hotels generally furnish bell boy, switchboard and desk services in many more cases and to a greater degree than tourist camps. In addition to furnishing rooms for loiging and eating purposes, hotels very often provide rooms for large gatherings and meetings; tourist camps, as a rule, do not.

From all the above it may be seen that the matter of classification of establishments is not one for absolute accurate determination. In the last analysis, since we are minded to construe words and phrases in their usual and ordinary sense, we think that the percentage of accurate classification will be in your favor if you license hotels and tourist camps according to what you and the public consider them to be, making use of what aids we have been able to furnish.

CONCLUSION

Therefore, it is the opinion of this department that it is not possible to precisely define tourist camps as distinguished from hotels and the Division of Health must classify such establishments by giving consideration to form and kind of building (or buildings), layout, location, service offered and other factors which will aid such determination.

Respectfully submitted,

APPROVED:

JOHN R. BATY Assistant Attorney General

J. E. TAYLOR Attorney General

JRB:ir

NARCOTICS: (1) A drug store or apothecary shop dispensing FOOD AND DRUG: narcotics must have a registered pharmacist therein before the owner or employer may be granted a state narcotic license. (2) A state narcotic license is not required to buy and sell drugs which contain narcotics in amounts equal to or smaller than those stipulated in Section 9839 of the 1939 Revised Statutes of Missouri. October 13, 1949, Honorable C. F. Adams, M.D. Acting Director, Division of Health Jefferson City, Missouri

Dear Sir:

This is in reply to your request for an official opinion of this office which request reads as follows:

> "1. Is it necessary to be a registered pharmacist or have a pharmacist in your employ before you are eligible to obtain a state narcotic license?

Is it necessary to obtain a state narcotic license before it is permissible to buy and sell drugs which contain narcotics in amounts equal to or smaller than those stipulated in Section 9839 of the State Narcotic Laws? We have reference to paregoric or Godfrey's cordial, which according to the Pharmacopoeia of the United States, XIII Revision, contains less than two grains of opium per one fluid ounce."

In regard to your first question, we understand from your telephone conversation since receiving your letter, that you have reference to persons or corporations dispensing or selling narcotic drugs in drug stores or apothecary shops at retail to the general public, and therefore we will not consider that there are other professional people and certain businesses that may be granted a state harcotic license.

Section 9832 defines an apothecary as follows:

"'Apothecary' means a licensed pharmacist as defined by the laws of this state, and, where the context so requires, the owner of a store or other place of business where narcotic drugs are compounded or dispensed by a licensed pharmacist; but nothing in this act shall be construed as conferring on a person who is not registered nor licensed as a pharmacist any authority, right, or privilege, that is not granted to him by the pharmacy laws of this state."

This would include a drug store or any other place of business selling and dispensing narcotic drugs. This definition plainly indicates that narcotic drugs must be compounded or dispensed by a licensed pharmacist.

Section 10023, Mo. R. S. 1939, provides:

"It shall not be lawful for any druggist or other person to retail or sell or give away any cocaine, hydrochlorate or other salts of or any compound of cocaine, or preparation containing cocaine, or any salt of or any compound thereof, or opium, morphine, codeine or heroin, excepting upon the written prescription of a licensed physician or licensed dentist, or licensed veterinary surgeon, licensed under the laws of the state, which prescription shall only be filled once: Provided, that the provisions of this section shall not apply to sales in the usual quantities at wholesale by any manufacturer or wholesale dealer when such manufacturer or wholesale dealer shall have affixed to the box. bottle or package containing such cocaine, hydrochlorate or other salt or compound of cocaine or preparation containing cocaine, or opium, morphine, codeine or heroin, a label specifically setting forth the proportion of cocaine, opium, morphine, codeine and heroin contained in any preparation: Provided, that the provisions of this section shall not be construed to apply to the sale, distribution, giving away, dispensing, or possession of preparations and remedies, which do not contain more than two grains of opium, or more than one-fourth of a grain of morphine, or more than one-eighth of a grain of heroin, or more than one grain of codeine, or any salts or derivative of any of them in one fluid ounce, or if a solid or semisolid preparation, in one avoirdupois ounce, or to liniments, ointments, or other preparations which are prepared for external use only, except liniments, cintments and other preparations which contain cocaine or any of its salts: Provided, that such remedies and preparations are sold, distributed given away, dispensed, or possessed, as medicines and not for the purpose of evading the intentions and provisions of this chapter.

This section plainly indicates that narcotic drugs cannot be dispensed or sold except on the written prescription of the professional people named in the statute. A prescription cannot be filled by anyone except a licensed pharmacist or a licensed physician. Section 10005 provides it shall be unlawful for any person not licensed

as a pharmacist within the meaning of this chapter to conduct or manage any pharmacy, drug or chemical store, apothecary shop or other place of business for the retail, compounding or dispensing of any drugs, medicines, chemicals, poisons or for the compounding of physician's prescriptions, or, to keep exposed for sale at retail any drugs, etc.

A druggist who is not a pharmacist must keep constantly in his employ a registered pharmacist to fill prescriptions and dispense narcotic drugs. State v. Jordan, 87 Mo. App. 420; State v. Shanks, 71 S.W. 1065, 98 Mo. App. 138. A doctor who dispensed cocaine from his drug store without a prescription and who was also a registered pharmacist was found guilty of dispensing said cocaine without a prescription, although he subsequently wrote a prescription as a physician, for said narcotic drug in the case of State v. Willis, 128 Mo. App. 214, 106 S.W. 584. The object of the Uniform Narcotic Drug Act, Sections 9832 to 9854, R. S. Mo. 1939, is to regulate and control traffic in the use of substances or preparations that are extremely injurious to moral qualities and physical structures of human beings, and one of the purposes of the Act is to make uniform among the separate states the law relating to narcotic drugs and to parallel and supplement Federal narcotic laws, State v. Martin (1940) 192 So. 679, 193 La. 1036. People v. Gennaro, (1941) 26 N.Y.S. (2d) 336, 261 App. Div. 533.

We understand that a federal narcotic license will not be granted to any apothecary shop or drug store that does not have a registered pharmacist working therein at all times.

In response to your second question, it is our opinion that the exemptions set forth in Section 9839, R. S. Mo. 1939, are clear and that it is not necessary to have a state narcotic license to buy and sell drugs which contain narcotics in amounts equal to or smaller than those stipulated in Section 9839, supra. This section provides in the first subsection thereof as follows:

"(1) Prescribing, administering, dispensing, or selling at retail of any medicinal preparation that contains in one fluid ounce, or if a solid or semi-solid preparation, in one avoirdupds ounce, (a) not more than two grains of opium, (b) not more than one-quarter of a grain of morphine or of any of its salts, (c) not more than one grain of codeine or of any of its salts, (d) not more than one-eighth of a grain of heroin or of any of its salts."

Therefore, if paregoric or Godfrey's cordial contains less than two grains of opium per one fluid ounce then a person would not have

to obtain a state narcotic license to sell the same or any other patent medicine qualified under the exemptions set forth in said Section 9839, but at all times subject to the conditions set forth in said section as to amount of said drugs or patent medicines that may be sold within a forty-eight hour period, and subject to the conditions stated in said section that the preparation shall have medicinal qualities other than those of the narcotic drug and that the same must be sold in good faith as a medicine.

There are no Missouri appellate court decisions in this state upon the questions you have propounded to us.

CONCLUSION

It is the opinion of this office that it is necessary for one to be a registered pharmacist or have a registered pharmacist in his employ in a drug store or apothecary shop before he may be granted a state narcotic license and before he may sell and dispense narcotic drugs.

It is also the opinion of this office that it is not necessary to obtain and have a state narcotic license to buy and sell drugs or patent medicines which contain narcotics in amounts equal or smaller than those stipulated in Section 9839 of the Revised Statutes of Missouri, 1939.

APPROVED:

J. E. TAYLOR Attorney Ganeral

SJM:mw

Respectfully submitted,

STEPHEN J. MILLETT

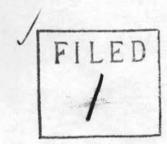
Assistant Attorney General

HEALTH: Section 9917, R.S. Mo. 1939, is in full force and effect, and it is the duty of the Bureau of Food and Drugs to enforce said section.

October 14, 1949

10/24/49

C. F. Adams, M. D. Acting Director Division of Health Jefferson City, Missouri



Dear Sir:

We have your recent letter requesting an opinion from this office. Your letter is as follows:

"We would like to have an official opinion on the following question: Is Section 9917 of the Rev. Statutes of Missouri, 1939, in force at the present time, and if so, is the Bureau of Food and Drugs responsible for the enforcement of this section?"

The first question is whether Section 9917, Article 5, R. S. Mo. 1939, is still in effect. Section 9917 is still in full force and effect, having never been repealed directly or by implication. That section is as follows:

"No person shall sell or offer for sale any flour, meal, grits or hominy, made from the admixture or adulteration of grains, unless there shall have been first branded upon each of the barrels or packages containing the same, the kind of grains composing said admixture, the quality and weight thereof, and the name and place of business of the person manufacturing the same: Provided, always, that the admixture of the several grades or kinds of wheat shall not be construed to be mixed or adulterated grains."

Section 9922, R. S. Mo. 1939, provides:

"Any person doing any of the acts in this article (Article 5) prohibited, or omitting to do any of the acts hereby commanded, shall be guilty of a misdemeanor, and for each and every offense shall be punished

by a fine of not less than twenty nor more than two hundred dollars, one-half of which shall be paid to the person who shall be named as prosecuting witness."

Your next question is whether the Bureau of Food and Drugs is responsible for enforcement of Section 9917, supra.

Section 9759.1, Laws of Missouri, 1945, page 945, provides for the establishment of the Department of Public Health and Welfare, and further provides: "The department of public health and welfare shall be composed of three divisions, namely: the division of health, the division of mental diseases, the division of welfare."

Section 9759.6, supra, provides, in part, as follows: "It shall be the duty of the governor * * * to appoint a director for each of the three divisions of the department of public health and welfare."

Section 9759.15, supra, provides, in part, as follows: "The division of health shall maintain * * * a bureau of food and drug inspection, * * *"

Section 9759.22, supra, entitled "Bureau of Food and Drug Inspection," is as follows:

"All powers and duties heretofore exercised by the state board of health pertaining to administration of acts relating to food and drugs shall be exercised by the division of health. In all laws of Missouri and in orders and findings thereunder, wherever the words 'food and drug commissioner' are used, they shall hereafter refer to and be understood to mean the director of health. Said director shall have power to appoint a deputy who, under the director, shall be chiefly responsible for administration of laws pertaining to food and drugs, and particularly to enforce all laws that now exist or that may hereafter be enacted regarding the production, manufacture or sale of any food products, or any ingredients that are used in the preparation of foodstuffs, or the misbranding of the same; and personally, or by his assistants, inspect any article of food or drug made or offered for sale in

this state which he may, through himself or his assistants, suspect or have reason to believe is impure, unhealthful, adulterated or misbranded, and shall have power to cause to be arrested and prosecuted, any person or persons engaged in the manufacture or sale of foods or drugs or any food ingredients contrary to the laws of this state. Said director shall make orders and findings for carrying out the provisions of this article and such orders and findings shall conform as nearly as practicable to the orders and findings at present established or which may hereafter be established for the enforcement of the Act of Congress, approved and known as the Food and Drug Act, together with any amendments thereto."

That part of Section 9759.22, supra, which provides, "Said director shall have power to appoint a deputy who, under the director, shall be chiefly responsible for administration of laws pertaining to food and drugs," clearly fixes on the Director of the Division of Health the ultimate responsibility for the enforcement of the Food and Drug laws. However, Section 9759.22, supra, by its title recognizes that the Director will perform the duty of enforcing the Food and Drug acts through a "bureau of food and drugs." The latter is not, by the plain intendment of the statute, to be considered an independent administrative unit, but is subject to the general direction and control of the Director of the Division of Health. Therefore, the Division of Health is actually responsible for the enforcement of the Food and Drug laws, but through its Bureau of Food and Drugs, and deputy thereof, is by statute directed to perform the administrative duties relating to the Food and Drug laws.

Section 9759.22, supra, clearly applies to Section 9917, supra, particularly that part of Section 9759.22 as follows:

"and particularly to enforce all laws that now exist * * * regarding the production, manufacture or sale of any food products, or any ingredients that are used in the preparation of foodstuffs, or the misbranding of the same." (Underscoring ours.)

CONCLUSION

It is the opinion of this office that Section 9917, R. S. No. 1939, and its accompanying penalty provision, Section 9922, R. S. Mo. 1939, are still in full force and effect, and that it is the duty of the Bureau of Food and Drugs to enforce Section 9917 as provided in Section 9759.22, Laws of Missouri, 1945.

Respectfully submitted,

H. JACKSON DANIEL Assistant Attorney General

APPROVED:

J. E. TAYLOR

Attorney General

HJD:m1

Definition of an apartment hotel and apartment house. FOOD AND DRUG: First is subject to Sections 9923 to 9954, R. S. M 1939, if the building has ten rooms or more, and the operator furnishes lodging services and retains right of access at all times. Apartment house not subject to hotel regulatory laws, if leased to tenants who have exclusive control of rooms.

October 14, 1949

Honorable C. F. Adams, M.D. Acting Director of Division of Health Jefferson City, Missouri

Dear Sir:

This is in reply to your recent request for an official opinion on the following questions:

> "1. 'We would like to know if an apartment hotel comes under the definition "hotel" and should be licensed and inspected under the state hotel laws, Sections 9923 to 9954.1

'We would like to know if apartment house comes under the definition "hotel". !"

The definition of buildings to be licensed as hotels, set out in Section 9931, R. S. Mo. 1939, is as follows:

> "That every building or other structure, kept, used, maintained, advertised or held out to the public to be a place where sleeping accommodations are furnished for pay to transient or permanent guests, in which ten or more rooms are furnished for the accommodation of such guests, whether with or without meals, shall for the purpose of this article be deemed a hotel, and upon proper application the food and drug commissioner shall issue to such above described business a license to conduct a hotel: Provided, that it shall be unlawful for the owner of any such building or other structure to lease or let the same to be used as a hotel until the same has been inspected and approved by the food and drug commissioner.

An apartment hotel has been defined as meaning a hotel where apartments are rented for fixed periods of time either furnished or unfurnished to the occupants of which the keeper of such buildings supplies certain services.

One of the leading cases on this question is Woods v. Western Holding Corporation, 77 Fed. Supp. 90. This case was tried before Judge Reeves of the Federal District Court of the Western District of Missouri in 1948, to determine whether or not the properties at Ward Parkway known as Casa Loma East and Casa Loma West were hotels and not subject to the Housing and Rent Act of 1947, enacted by the Congress of the United States. Said buildings were each nine stories high and had sixty-five units. Each had mail service and laundry service, telephone and desk service, furnishing use and upkeep of furniture by the operator of the building and a limited bell boy service. No uniformed bell boys were furnished but the elevator boy served as bell boy in certain cases. The witnesses for the operating corporation testified that in Kansas City there are three classes of hotels first, the regular commercial or transient hotel devoting the greater part of its business to the traveling public. Second, the apartment hotel, and, third, the family hotel. The witnesses testified that the properties in question were apartment hotels in their opinion and that they accommodated many permanent guests but that they also made provisions for transient guests. The evidence in this case also proved that they were classified by the state regulatory authorities as a hotel and paid an occupation tax as a hotel.

Judge Reeves held that the properties were clearly hotels under the definition set forth in Section 9931, R. S. Mo. 1939, and that the object of this law was to enable the State of Missouri to exercise proper supervision over housing accommodations of this character. The controlling factors in this case were the fact that pass keys to the apartments were in the control of the operating corporation and that in no case was the occupant in exclusive domination as in the case of tenants, but in every way the occupants sustained a precise relation to the operator as any guest would sustain to the operator of a hotel, whether it be commercial, family or otherwise. The court held in this case that the properties were not subject to the rent control provision because they were hotels and hotels were exempt from the provisions of the Act.

The case of Marden vs. Radford, 84 S.W.(2d) 947, 229 Mo. App. 789, discusses this question in great length because the question of liability arose with respect to an occupant of a kitchenette apartment. If the occupant was a lodger and not a tenant then the owner of the property would be liable to the occupant for the owner would owe a duty to the lodger of safe occupancy.

In this case there was no common or public dining room in the building, and there were no bell boys. Neither maid nor laundry service was furnished. The occupant cleaned the rooms in the apartment and occupied the apartment as a family home and the family meals were cooked therein. The occupants of course had a key to their apartment but the operator of the building also had a key to the apartment. The apartments were rented upon

a monthly or yearly basis. The court held that the term lodger has been defined as a person who occupies a part of another's house, one who for the time being has his home at his lodging place, one who has leave to inhabit another man's house, one who has the right to inhabit another man's house, one who inhabits a portion of a house of which another has the general possession and custody (paragraph 6, page 95h) "the term is also defined as a person who lives and sleeps in a place, a person whose occupancy is a part of a house and subordinate to and in some degree under the control of a landlord or his representatives. A lodger lodges with someone who has control over the place where he lodges."

This case holds:

"The chief distinction between tenant and a lodger apparently rests in the character of the possession. A tenant has the exclusive legal possession of the premises, he and not the landlord being in control and responsible for the care and condition of the premises. A lodger, on the other hand has merely a right to the use of the premises, the landlord retaining the control and being responsible for the care and attention necessary and retaining the right of access to the premises for such purpose." (Sec. 7, page 955.) (Underscoring ours.)

The operators of the building in this Marden v. Radford case had complete control over the lobby and egress from and ingress to the building. The operators furnished the gas, water, light and telephone service to the plaintiff's apartment and was in control of the means by which this service could be cut off from plaintiff's apartment at any time. The operator owned the silverware and the linens in the apartment.

The court held in this case that the building was an apartment hotel and that the occupant was a lodger because the occupant had the use, without the actual and exclusive possession and control, of the premises in question. To have been a tenant he must have the exclusive possession and control.

The court held in this case that when a person thus in possession of a building rents to another a room or rooms and furnishes to such others the gas, the light, the water, the heat and the telephone service in the building, a lobby, an office and a staff of servants to furnish various services to the occupants of the various units and remains personally, through his manager, in general possession and control of the entire building then it is a hotel or apartment hotel.

A California court said:

"A lodger is one who has no interest in the realty, but who occupies part of a tenement which is under the control of another. When the owner of the realty engages in the business of supplying accommodations to lodgers, he is conducting a business different from that of letting property to tenants." (Edwards v. City of Los Angeles, 48 Cal. App. 62.)

Our laws, Sections 9931, 9955, 9854.1 (R. S. Mo. 1939) requires a license and compliance with health and safety regulations of all persons who engage in the business of supplying lodging accommodations. The burden of proof is upon the owner or operator of a building furnishing lodging accommodations to the public to establish that the occupants of the building are tenants with definite leasehold rights.

Therefore, the answer to your question of what would constitute an apartment hotel and whether or not it would be subject to the control and licensing under the state hotel laws would depend upon whether or not the building operators retained control over the apartments or rooms so that they had access to them at any time to service the rooms or to inspect them for any purpose and it would not make any difference whether they advertised the building as a hotel or apartment hotel or apartment house provided they had ten rooms or more, as required by the statute, in the building.

An apartment house has been defined in Austin v. Richardson (Texas) 288 S.W. 180, as follows: (1.c. 181)

"A building in which separate and distinct suites of rooms are occupied by one or more persons for residence purposes; the occupant or occupants of each such suite of rooms having exclusive management and control of and dominion over the rooms so occupied.* * *"

Therefore, an apartment house in which the occupants had complete and exclusive control over the apartments with a lease from the owner or operator and over which the owner or operator surrendered control and possession during the term of the lease, and which could not be entered by the owner or operator of the building without the permission of the occupant of the apartment would be an apartment house and not subject to the state hotel laws. But in the same building it may be operated as a hotel, a rooming or lodging house, and an apartment house as separate institutions or in combination under the same management. Such operation does not make the occupants of the building of one class. The relationship of the owner with some might be that of hotel keeper; with others, that of landlord

and tenant; with still others that of lodging house keeper depending upon the contract with each particular guest and the character of each particular occupant.. (See Cedar Rapids Investment Co. v. Commodore Hotel Co., 205 Iowa, 736, 218 N.W. 510, 56 A.L.R. 1098. If ten rooms or more in such a building were operated for guests or lodgers, then it would be subject to hotel regulations.

CONCLUSION

An apartment hotel as defined above comes under the definition of hotel and should be licensed and inspected under state hotel laws, Sections 9923 to 9954, R. S. Mo. 1939. An apartment house as defined above would not come under the definition of hotel and would not be subject to said requirements. The test as to whether or not it is an apartment hotel or an apartment house depends upon the service rendered to the occupants and whether or not the occupants are in exclusive control and possession of the apartments. If they are not in exclusive control and possession, and receive lodging services, then the building they occupy would be subject to hotel regulations and license if it contained ten rooms or more, used as set forth in Section 9931, R. S. Mo. 1939.

Respectfully submitted,

STEPHEN J. MELLETT

Assistant Attorney General

APPROVED:

J. E. TAYLOR Attorney General

SIMINW

FOOD AND DRUG:

Sale, etc. of any drug not branded with adequate directions for the use thereof is misbranding under and a violation of Food and Drug Act.

November 28, 1949

Mr. C. F. Adams, M.D., Acting Director, Division of Health, State Office Building, Jefferson City, Missouri



Dear Dr. Adams:

Your request for an official opinion from this Department, dated November 1, 1949, together with letter addressed to Mr. J. L. Rowland, Director, Bureau of Foods and Drugs, State Board of Health, Jefferson City, Missouri, dated October 18, 1949, signed by W. A. Queen, Chief, Division of State Cooperation, with other information attached, has been assigned to the writer for reply. Your opinion request reads:

"We would like to have an official opinion from your department concerning the attached case in regard to lectures by Mr. Lelord Kordel, operating for New Dawn Health Food Store, St. Louis, Missouri.

"We would like to know if inadequate directions for use of these products may be considered misbranding under our State Food and Drug Laws, and if it would be advisable to prosecute the party or parties responsible in this case.

"Our local inspector has obtained samples of all these products and our laboratory is at the present time engaged in analytical work to determine if the products in question contain the chemicals and vitamins which have been indicated on the label."

In answering your letter, I assume that Mr. Lelord Kordel at the times and place mentioned in the letter to Mr. Rowland was delivering a lecture or lectures seeking to promote or accelerate sales of the products mentioned in the letter last referred to; and I assume that at the times and place of the lecture or lectures delivered by Mr. Kordel, he did not offer to sell direct to his

listeners, container or containers holding such product; and I assume that the products mentioned were in containers and being offered for sale, delivery, or held for sale by the concern referred to as, "New Dawn Health Food Store", St. Louis, Missouri, and that the container or containers did not bear a label stating adequate directions for use of the product by consumers thereof; and, I am assuming also that the containers were not accompanied, in a package or otherwise, by written or printed instructions giving adequate directions for use of the product; I am also assuming the products mentioned in the letter to Mr. Rowland contain drugs within the meaning of Section 9857, (d) Laws of Missouri, 1943, p. 561.

1. Section 9858, Laws of Missouri, 1943, p. 563, among other things, provides as follows:

"The following acts and the causing thereof within the State of Missouri are hereby prohibited:

- "(a) The * * * sale, or delivery, holding or offering for sale of any * * * drug, device, * * * that is * * * misbranded.
- "(e) The dissemination of any false advertisement."

The terms "label", "immediate container", "labeling" and "misbranded", as set out in Laws of Missouri, 1943, p. 562 are as follows:

- "(h) The term 'label' means a display of written, printed, or graphic matter upon the immediate container of any article; and a requirement made by or under authority of this Act that any word, statement, or other information appearing on the label shall not be considered to be complied with unless such word, statement, or other information also appears on the outside container or wrapper, if any there be, of the retail package of such article, or is easily legible through the outside container or wrapper.
- "(i) The term 'immediate container' does not include package liners.
- "(j) The term 'labeling' means all labels and other written, printed, or graphic matter (l) upon any article or any of its containers or wrappers, or (2) accompanying such article.

"(k) If an article is alleged to be misbranded because the labeling is misleading, then in determining whether the labeling is misleading, there shall be taken into account (among other things) not only representations made or suggested by statement, word, design, device, sound, or in any combination thereof, but also the extent to which the labeling fails to reveal facts material in the light of such representations or material with respect to consequences which may result from the use of the article to which the labeling relates under the conditions of use prescribed in the labeling thereof or under such conditions of use as are customary or usual."

Section 9870, Laws of Missouri, 1943, p. 572, in part, provides:

"A drug or device shall be deemed to be misbranded -

"(f) Unless its labeling bears (1) adequate directions for use; * * * Provided, That where any requirement of clause (1) of this paragraph, as applied to any drug or device, is not necessary for the protection of the public health, the Board shall promulgate regulations exempting such drug or device from such requirements."

I also note that you state Mr. Lelord Kordel was "operating for New Dawn Health Food Store."

2. The regulations issued under the Federal Act quoted in the letter to Mr. Rowland are not helpful, except as they show that the regulation of your Department set out in the same letter is not in conflict with such federal regulations as required by Section 9864, Laws of Missouri, 1943, p. 567; however, I may point out that the only specific direction in the regulation issued by your Department is:

"Directions for use shall include quantity of dose."

The remainder of the quoted regulation is not specific in command and depends for its enforcement on the condition or fact

that:

"Where it is deemed to be in the interest of the public health for the protection of the consumer."

And consequently, would be of little value in enforcing the State Drug Act. The form of regulations issued under the Federal Act above referred to and as set out in the margin of the opinion in Colgrove, et al. v. United States 176, F 2d, 614, hereafter referred to, would appear to be applicable in enforcement of the State Drug Act, if and when properly promulgated.

3.

(a) If violated, we think that a prosecution in our state courts can be successfully maintained in the labeling on articles such as those mentioned or referred to in your letter do not bear adequate directions for use and one of the required directions under your regulation is the quantity of dose of the product to be used by the consumer. Undoubtedly, acts of ommission, as well as commission, fall within the ban of the State Drug Act.

Section 9857, (b) Laws of Missouri, 1943, p. 561 in referring to the State Food and Drug Act provides:

"The term 'person' includes individual, partnership, corporation, and association."

If Kordel, at the time he delivered the lecture or lectures had sold, offered for sale, delivered, or held for sale to and for his listeners, any of the mislabeled products referred to in your letter, then he would be guilty of a violation of the Act as it has been heretofore defined or set out, but since it does not appear from your letter that he did any of the things just mentioned, then we see no basis for prosecution against him individually. See cases of Migratory Bird Treaty Act, 281 F. 546, 548; Crawford v. Newark Star Pub. Co. 183 A. 73 (N.J.); Hardwick v. Reardon 6, Ark. 77.

(b) We cannot gather from your letter whether the New Dawn Health Food Store is owned individually, as a partnership, voluntary association of persons, or a corporation but, whatever that fact may be, if those responsible for the operation of the concern have sold, or have or are offering for sale, or keeping for sale or delivery the products mentioned in your letter, without the same being labeled with adequate directions for its use, including the amount of dosage thereof, then such persons would be liable to prosecution under the State Food and Drug Act and subject to the penalties as provided in Section 9860, Laws of Missouri, 1943, p. 564, upon conditions hereafter set out.

I do not find any reported case in this state construing the State Drug Act in respect to the matters with which we are concerned but a similar problem was before the United States Circuit Court of Appeals in Colgrove et al. v. United States 176, F 2d, 614. The case being an appeal from a conviction for criminal contempt growing out of the violation of an injunction judgment issued by a District Court. The proceeding being had under 21 U. S. C. A. Sec. 332 (a), a provision of the Federal Food, Drug and Cosmetic Act comparable to our State Act. We quote sufficient from the opinion, a copy of which is attached to your letter, so that you may gather its significance as applied to the Act, with the enforcement of which your Department is concerned:

"In 1945 appellants changed the labeling of the Colusa Oil preparations so that the labels failed to mention any maladies for which the drugs were recommended. However, they then proclaimed the worth of the products in the treatment of specified ailments extensively in newspaper advertisements. Early in 1947 the United States sought an injunction in the court below restraining the shipment of the products in interstate commerce without a label containing adequate directions for their use in the treatment of all conditions for which they were prescribed, recommended and suggested in the advertising material. The action was predicated on 21 U.S.C.A. Sec. 352 (f) (1), which provides that a drug or device shall be deemed to be misbranded unless its labeling bears adequate directions for use. A preliminary injunction was granted, D.C. 83 F. Supp. 880, after which the court

issued a permanent injunction with appellants' consent. Appellants then devised a label on which it was stated that the products were intended for use in the treatment of four skin diseases, namely psoriasis, eczema, athlete's foot, and leg ulcers. Specific directions as to the method of use for these affections were incorporated in the label. * * **

"Thereupon the government filed a contempt information containing nine counts, predicated on allegations of nine interstate shipments. The charge in each count is that appellants disregarded the injunctive orders in that the advertising material disseminated by them prescribed, recommended and suggested the use of the oil in the treatment of certain diseases in addition to the four mentioned on the label, and that adequate directions for using the remedy for those diseases were not printed on the label. The information is based on 21 U.S. C. A. Sec. 332 (b). A jury and special findings were waived and upon trial to the court appellants were adjudged guilty on eight counts.

" * * * The Act prohibits the introduction into interstate commerce of any misbranded drug. 21 U. S. C. A. Sec. 331 (a). A drug is deemed misbranded if its labeling bears inadequate directions for use, 21 U. S. C. A. Sec. 352 (f) (1); and as appears in footnote 3 above the authoritative regulations declare directions inadequate if there is an omission of directions for use in all conditions for which the drug is prescribed, recommended or suggested in advertising matter sponsored by the manufacturer or distributor. The court's statutory authority for the issuance of the injunctions and for the trial of violations thereof is ample and has already been indicated.

"Little comment need be made on this advertising; it speaks for itself. Plainly the sponsor intended to be understood as adopting as his own the quoted statements of the doctors and professional dispensers of the preparation. That these would be taken by the lay reader as unqualifiedly prescribing the use of Colusa oil in the treatment of acne and poison ivy, or oak, admits of no fair doubt.

The term 'prescribed' is given the following definition by Webster: 'Med. To direct, designate, or order the use of, as a remedy.' The word 'designate,' in turn, is defined as 'to mark out and make known; to point out; to indicate.' Neither logic nor fairness requires a narrower definition of the term when employed in flamboyant advertising like the present. The word 'prescribe' of course includes recommending and suggesting.

"Other points urged are unworthy of specific attention.

"Affirmed."

(c) You, of course, are familiar with the provisions of Section 9861 of above laws entitling you to proceed as by condemnation in certain justified circumstances.

Section 9862, Laws of Missouri, 1943, p. 567, makes it the duty of the prosecuting attorney in any county or city in this state when called upon by your Department to render legal assistance in the execution of the State Food and Drug Act and to prosecute the cases arising under the provisions of that law. However, before any violation of the act is reported to the prosecuting attorney for the institution of a criminal proceeding, the person against whom such proceeding is contemplated, should be given appropriate notice and an opportunity to present his views before your Department or its designated ageny, either orally or in writing, in person or by attorney, with regard to such contemplated proceeding. It follows, therefore, that any criminal prosecution that may be instituted on the facts stated by you will be done by the prosecuting attorney on the county or city where the crime occured and before such crime is reported to such prosecuting attorney for the institution of a criminal proceeding, the notice to the proposed defendant or defendants must be given as provided in Section 9862. We do not conclude from a reading of a first portion of Section 9862 that it relates solely to a proceeding in condemnation under Section 9861 penalties provided for in Section 9860 above referred to.

4. For whatever purpose it may serve, we call your attention to that case of United States v. Kordel reported in 164 F. 2d.

p. 913, wherein a judgment of conviction against the defendant, Lelord Kordel, for violations of the Federal Food, Drug and Cosmetic Act was affirmed. The conviction being obtained in the United States District Court for the Northern District of Illinois Eastern Division. The charge against the defendant, specifically, was for the shipping of drugs and literature alleged to constitute misbranding under the latter Act.

We quote from the opinion in the latter case as follows, at p. 914:

"Appellant is a self-styled authority on nutrition and vitamins. He testified that he had written many papers on the subject of vitamins, herbs, minerals and nutritional diet subjects in general, securing the material for preparation of his papers from books. Operating under various trade names, he had been producing and marketing his own products since January 1941, largely through 'health food' stores. The products appear to be, for the most part, compounded of various vitamins, minerals and herbs. * * *'

And p. 916:

"With respect to the misrepresentations contained in the accompanying literature we think there can be no serious question. two booklets, 'Nutrition Guide,' and 'What you can do about relieving the agonies of Arthritis,' were written by appellant who, in the latter, is described as 'America's leading vitamin and diet expert.' 'Health Today, Spring 1945,' is edited by the same 'famous nutrition and vitamin authority.' While all purport to be scientific publications of general interest apart from the articles produced and marketed by appellant, written by an expert in the field, in fact, all are replete with references to the Kordel products and their uses to prevent, ameliorate or cure a vast and diverse variety of ailments, and each conveniently closes with a price list of the various Kordel products recommended for use therein. All are concerned primarily with promoting the sale of the various products by explaining the need

for each, along with extravagant claims as to the usefulness of each. A study of the three pamphlets reveals that the products therein described are recommended for relieving stomach agonies, general weakness, anemia, premature old age, high blood pressure, liver troubles, failing eyesight, sore feet; maintaining blood energy, muscular activity, sound teeth and gums, healthy skin, hair and eyes, normal functioning of the pituitary and thyroid glands, stomach, intestines, colon, liver and kidneys; and preventing arthritis and stiff joints, excess weight, catarrh, nervous breakdown, sterility, and paralysis."

This Department does not know and has no opinion as to whether or not the defendant in the case quoted from is the same person as is mentioned in your letter.

5. In connection with what is said in the foregoing Paragraphs 1, 2, and 3 the word "adequate" as used in Section 9870 (f) (l) is defined generally as meaning "sufficient", "enough", "as much as may be necessary", see,

Britain v. Industrial Commission 115 N.E. 110 Guim v. R. R. Co. 101 N. W. 94 State v. Builling 105 Mo. 204

And in the sense in which "directions" is used in the latter paragraph subdivisions, the word is generally defined by Webster as the act of directing; guidance; authoritative instruction; information as to method.

6. You inquire of this Department if it would be advisable to prosecute the party or parties responsible in this case - That is the case you submit:

You understand the problems confronting you in the enforcement of the State Food, Drug and Cosmetic Act and the importance of the omissions as to directions claimed to exist in this case and you are perhaps advised as to the character of the business and persons involved, so that as to whether or not a prosecution should be instituted is a matter that must be determined by your Department, keeping in mind the exceptions set out in Section 9860 above quoted, the admonition contained

. . .

in Section 9863, Laws of Missouri, 1943, p. 567 and also that under the provisions of Section 9862 above referred to, it is your duty to submit to the proper Prosecuting Attorney, the facts in each case where a prosecution is desired or proposed by your Department.

CONCLUSION

Upon the facts stated in your letter and the latter addressed to Mr. Rowland, together with the facts assumed as stated in this opinion, it is the opinion of this Department:

- (a) That Lelord Kordel in delivering the lecture or lectures referred to did not sell, deliver for sale, hold for sale or offer for sale any article in violation of Section 9867 or 9870.
- It is further the opinion of this Department that if the New Dawn Health Food Store sold, delivered for sale, hold or held for sale or are offering for sale the article referred to containing a drug and if such article did not bear or have on the labeling thereof adequate directions for the use of such article, as the words "adequate" and "directions" are above defined, or if such labeling did not contain specific directions for the use of such article in the treatment of all conditions, ills and diseases for which such article was or is prescribed, recommended or suggested, then such omission on the part of the New Dawn Health Food Store would constitute a misbranding by it of such article in violation of the State Food, Drug and Cosmetic Act, if it is a corporation, and the individual or individuals taking part in such illegal acts on behalf of the corporation would also be subject to prosecution therefor, or, if the New Dawn Health Food Store is owned individually or by a partnership or other association of persons, then the person or persons acting for said New Dawn Health Food Store and committing such illegal acts would likewise be criminally liable therefor.

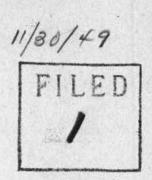
Respectfully submitted,

APPROVED:

GILBERT LAMB, Assistant Attorney-General

J. E. TAYLOR Attorney General TAXATION: Intengible property tax on property held in trust distributed in county or city of domicile of trustee. Divided when two trustees reside in different counties.

November 28, 1949



Mr. T. R. Allen, Supervisor Income Tax Unit Department of Revenue Jefferson City, Missouri

Dear Sir:

We have received your request for an opinion of this department, which request is as follows:

"I am in receipt of the following letter from Mr. J. H. Cunningham, Jr., Attorney for the City of Ladue, St. Louis County, Missouri, which I quote herewith:

"The City of Ladue, an incorporated city of the fourth class, has not been receiving all of the intangible tax revenue to which it feels it is entitled. This has resulted in part from the practices followed by taxpayers who reside in Ladue but list on their intangible tax returns an address in the City of St. Louis which is their business address.

"In investigating this matter the following situations have presented themselves, to-wit: There are a number of cases where a trust exists under the terms of a written instrument (either a will or a revocable or irrevocable living trust indenture) with legal title to intangibles vested in two Trustees, one an individual residing in Ladue, and the other a bank or trust company located in the City of St. Louis. In other cases the sole Trustee is a St. Louis bank or trust company. The beneficiaries of the trust in each of the cases referred to are residents of the City of Ladue, but the trust assets are kept in the bank in St. Louis.

"'We are engaged in friendly discussions with the City of St. Louis relative to which city is entitled to receive the intangible tax monies on such trusts (1) where the beneficiary resides in Ladue and one of two

co-trustees resides in Ladue but the other co-trustee resides in the City of St. Louis; and (2) where the beneficiary resides in the City of Ladue and the sole Trustee is a St. Louis bank or trust company. Accordingly we respectfully request that you obtain an opinion from the Attorney General covering these two questions.

"The question herein involved is in respect to the distribution of intangible taxes to the political subdivisions of this State and involves intangible instruments handled by banks or trust companies. I believe the questions involved are set out in the last paragraph of the above quoted letter.

"Will you kindly let me have an opinion with respect to the proper political subdivision to which such collections should be distributed."

The intangible personal property tax law is found in Laws of 1945, at page 1914. Provisions of the law relevant in answering the questions propounded are as follows:

"The taxable situs of intangible personal property for the purpose of this act shall, for residents of Missouri, be the residence of the owner thereof. If any law shall provide for the payment of the intangible property tax at its source the taxable situs shall be the location of the business owning or administering the intangible property. * * * " Section 1(D).

"Intangible personal property shall be deemed to have a taxable situs in this state for the purpose of being subject to a property tax for the year 1947 and each succeeding year, where, at any time during the calendar year preceding the year for which the property is subject to said tax, the legal title thereto is owned by a person domiciled in this state, or by a domestic corporation, or where said intangible property acquires a business situs

in this State when the legal title thereto is owned by a person not domiciled in this state, or by a foreign corporation. In all cases where both the persons holding or owning the legal title and the equitable title or beneficial interest in the same property are domiciled in this state, only the holder of the legal title shall be liable for such tax. * * * Section 6.

"The Director of Revenue shall annually, on or before the 15th day of September, return the amount or intangible taxes collected, less two per cent (2%) thereof, which shall be retained by the State for collection, to the county treasury of the county in which the particular taxpayers are domiciled or in which the intangible personal property which was the subject of the tax had its business situs. * * * " Section 14.

We shall first direct our attention to the distribution of the tax in the second situation presented in your request, to-wit, where the beneficiary resides in the City of Ladue and the sole trustee is a St. Louis bank or trust company. Under section 6 of the act, quoted above, the trustee is the person liable for the tax in such situation, inasmuch as both the holders of the legal and equitable titles are domiciled in this state. Section 14 requires that the tax collected be distributed "to the county treasury of the county in which the particular taxpayers are domiciled." Inasmuch as the trustee is the taxpayer in such situation, that provision would appear to govern the handling by the state of the tax in such situation. Does the provision of section 1(D), fixing the situs of the property for the purpose of such tax at the domicil of the "owner" thereof affect this conclusion?

We find no cases in Missouri dealing with the question of who is, for the purposes of taxation, the "owner" of tangible or intangible personal property held in trust. "Where the situs of trust property and the domicile of the trustee and cestui are in the same state, it is purely a question of legislative discretion whether taxes levied on the property are assessed to one or the other." 2 Bogert on Trusts, Sec. 263, p. 845. The legislature has in this act made the trustee the person liable for the tax. The trustee, in the absence of provision to the contrary, would, according to the majority view in such matters, have been the person responsible for the return and tax. "Generally, in the absence of statutory provision to the

contrary, and sometimes with statutory sanction or command, it is held, as against contentions that the personal property held in trust is taxable in another place in the state, that such property is taxable only at the place or residence or domicil of the trustees in the state." Annotation, 129 A.L.R. 273. Such being the rule, we feel that, in view of the absence of any indication that the word "owner" is used other than in the sense usually applied in determining the situs of intangibles held in trust, the proceeds of such tax should be transmitted to the treasury of the county in which the domicil of the trustee is situated, without regard to the residence of the beneficiaries.

As for the first question, in view of the foregoing, the residence of the beneficiaries is immaterial. Distribution of the proceeds of the tax is made in accordance with the domicil of the trustees. This department, in an opinion dated October 29, 1946, and addressed to Mr. M. E. Morris, Director of Revenue, held that "joint owners of intangible personal property subject to the tax imposed under the provisions of H.C.S.H.B. No. 868 (Laws of 1945, p. 1914) of the 63rd General Assembly should make return of such intangible personal property for purposes of taxation."

In an annotation found in 129 A.L.R. 290, the following is stated: "In a majority of cases considering the question, sometimes as the result of statutory persuasion, the rule calls for a proportional taxation of the personal property of a trust or an estate at the residence of each trustee, executor or administrator (in jurisdictions where the personal property of a trust estate is taxed at residence of the fiduciary), depending on the number of such fiduciaries, without regard to the place where the property is situated."

As set out above, under section 14 of the act in question, the proceeds of the tax go to the treasury of the county "in which the particular taxpayers are domiciled." Such being the situation, we feel that in the instance presented, the proceeds of the tax should be equally divided, one-half to go to the treasury of the City of St. Louis, and one-half to the treasury of St. Louis County, in which the City of Ladue is located.

CONCLUSION.

Therefore, this department is of the opinion that where the beneficiary of a trust resides in the City of Ladue, in St. Louis County, and the sole trustee of the trust estate is a bank or trust

company located in the City of St. Louis, the proceeds of the tax upon the intangible personal property of such trust should be transmitted by the Director of Revenue to the treasury of the City of St. Louis, as the domicil of the taxpayer, and that where the beneficiary of a trust resides in the City of Ladue, and one of two co-trustees resides in the City of Ladue and the other co-trustee resides in the City of St. Louis, the proceeds of such tax should be equally divided and one-half transmitted to the treasury of the County of St. Louis and one-half to the treasury of the City of St. Louis.

Respectfully submitted,

APPROVED:

ROBERT R. WELBORN Assistant Attorney General

J. E. TAYLOR Attorney General

RRW/feh

BUREAU OF 1 OD AND DRUGS: HOTEL INSPECTION:

Hotel which has sleeping rooms which do not open to the outside of the building or upon light wells, air-shafts or courts violates Sec. 9940, R.S. Mo. 1939, and a skylight above a hall in which the rooms open would not be an adequate or a legal substitute for a light well or air-shaft.

December 6, 1949

Honorable C. F. Adams, M.D. Acting Director, Division of Health Jefferson City, Missouri

Dear Sir:

I.

We have the following request for an official opinion from your office:

"Under the State Hotel Laws, Section 9940, the last sentence in this section reads, 'No room shall be used for a sleeping room which does not open to the outside of the building or upon light wells, air shafts or courts, and there must be at least one window with opening so arranged as to provide easy access to the outside of the building, light wells, air shafts or courts.' We believe that my establishment which has rooms, the windows of which open into a hall or a hall which is provided with a sky light have failed to comply with the requirements of this Section.

'Is our interpretation of this section correct?'

"In order to clarify this question, we are enclosing some pencil sketches showing the floor plan of several such establishments."

II.

We first must consider what the Legislature meant by the terms light wells, air shafts or courts in Section 9940, R. S. Mo. 1939. This section provides as follows:

"Every hotel in this state shall be properly plumbed, lighted and ventilated, and shall be conducted in every department with strict regard to health, comfort and safety of the

guests: Provided, that such proper lighting shall be construed to apply to both daylight and illumination, and that such proper plumbing shall be construed to mean that all plumbing and drainage shall be constructed and plumbed according to approved sanitary principles, and that such proper ventilation shall be construed to mean at least one door and one window in each sleeping room. No room shall be used for a sleeping room which does not open to the outside of the building or upon light wells, air shafts or courts, and there must be at least one window with opening so arranged as to provide easy access to the outside of the building, light wells or courts."

This section shows that it was the intention of the Legislature to provide outside ventilation and light to each sleeping room in every hotel in this state.

The last sentence in this section provides that there must be at least one window with the opening so arranged as to provide easy access to the outside of the building, light wells or courts. You will note that this sentence omits the words "air shafts" which are too small to permit a person to make access to the outside of a building, but at least one window must be so arranged to allow the occupant of the room to secure easy access to the outside of the building, light well or court in order that the person occupying the room might escape in the event of a fire in the hotel. It is the duty of the Division of Health toprotect and safeguard the health and safety of the public.

The term "well" is defined as an architectural term in Webster's Dictionary as meaning "an open space extending vertically through floors." The Dictionary of Architecture and Building by Russell Sturgis, Vol. 3, page 1034, defines a well as "an open space more or less enclosed and commonly of small dimensions as compared to its height. Thus, the open space between walls in which a stair or elevator is placed may be spoken of as a well." This same volume at page 490 defines a shaft as "in modern usage, often a straight enclosed space, as a well extending through the height of a building or through several stories, for the passage of an elevator; to give light to interior rooms, or the like. Commonly, as light shaft."

Therefore, a light well is the same as a light shaft and is an enclosed space inside of a building extending through the floors and open to the sky so that air and light may enter and leave through the light well or light shaft. The air shaft would

mean the same except that it is commonly of smaller dimensions and does not permit very much light to enter.

A court is an uncovered area partly or wholly enclosed by buildings or by walls according to Webster's Dictionary and is commonly understood to mean a larger area or space than a shaft or well.

Sky light is defined by said Sturgis' Dictionary of Architecture and Buildings in Vol. 3 at page 523 and 524 as a glass aperture in a roof with a simple glazed frame set in the plane of a roof, or a structure surmounting a roof with upright or sloping sides and perhaps an independent roof; the entire structure consisting wholly or in a large part, of glazed frames. Sky lights are often provided with ventilators arranged to be opened or closed by cords from below."

From the above definitions we believe that your interpretation of Section 9940, R. S. Mo. 1939, is correct in holding that hotel rooms that have windows which open into a hall or halls which are provided with only a sky light have failed to comply with requirements of the law.

III.

CONCLUSION

It is, therefore, the opinion of this department that a hotel which has sleeping rooms which do not open to the outside of the building or upon light wells, air shafts or courts violates Section 9940, R. S. Mo. 1939, and a sky light above a hall into which the rooms open would not be an adequate or a legal substitute for a light well or air shaft. Each room must have at least one window which will provide easy access to the outside of the building, light wells or courts.

Respectfully submitted,

STEPHEN J. MILLETT

Assistant Attorney General

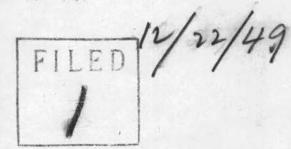
APPROVED:

J. E. TAYLOR Attorney General

SJM:mw (

December 7, 1949

Honorable J. F. Allebach Prosecuting Attorney Gentry County Albany, Missouri



Dear Sir:

This is in answer to your letter of recent date requesting an official opinion on the question of whether or not a game known as "dartaway" is a lottery. According to the enclosed memorandum the game is played as follows:

"1. Registration Books.

"Each book is called a volume. The volumes are designated by a letter of the alphabet, as 'Volume A'.

"Each volume has 26 pages, lettered from A to Z.

"Each page has 26 lines, lettered from A to Z.

"2. Board.

"Displayed on the front side of the board are a series of concentrically arranged circles divided by radial lines to provide lettered spaces.

"The spaces in the inner circle are lettered to correspond with the letters by which the volumes are designated.

"The spaces in the other circles are lettered to correspond with the letters designating the pages and lines in a volume.

"3. Darts.

RULES OF THE GAME

"The register or volume is placed at the theatre entrance available to the public.

Any person is privileged to sign his name on one of the lettered lines in the volume. When the person or individual does this, he is given a slip of paper on which is written the letter of the volume, letter of the page and letter of the line on which the person has signed his name.

-2-

"At the time set for the playing of the game, at which time the theatre is open to the public, persons in the audience and whose name appear in the register book are asked to volunteer to play the game.

"If more than one person volunteers-then a quiz is held on a historical, geographical, or current events subject until only one person among the original volunteers is left.

"The person thus volunteering or selected through the quiz program, is permitted to throw as many as three darts at the board in an attempt to hit the space in the inner circle which contains the letter of the volume in which the name appears.

"If the volunteer is successful in hitting the space containing his volume letter before the supply of darts furnished him is exhausted, he is then permitted to throw as many as three darts in an attempt to hit the space in the other circles containing the letter of the page whereon his name appears.

"If the volunteer is successful in hitting the space containing his page letter before the supply of darts furnished him is exhausted, he is then permitted to throw as many as three darts in an attempt to hit the space in the other circles containing the letter of the line whereon his name appears.

"If the volunteer is successful in hitting the space containing the letter of the line whereon his name appears then he is awarded the posted prize of \$15.00.

"If he is unsuccessful but hits a space in the other circles containing a letter then the individual whose name appears on the line containing the letter hit is invited to come forward and attempt to hit by means of two darts, two letters on the board which will spell an English two-letter word, like "to", "we", "so", etc. If successful in "spelling" a two letter word this individual is given the \$15.00 prize.

"If the volunteer fails to hit his volume letter with three darts furnished him, the game ends and the prize is carried over and added to the prize to be awarded at the next playing of the game. If the person whose name is called is not in the theatre, the prize is not awarded, but carried over to the next playing.

"If the party is not in the theatre, there will be no prize."

Section 4704, R. S. Missouri, 1939, provides as follows:

"If any person shall make or establish, or aid or assist in making or establishing, any lottery, gift enterprise, policy or scheme of drawing in the nature of a lottery as a business or avocation in this state, or shall advertise or make public, or cause to be advertised or made public, by means of any newspaper, pamphlet, circular, or other written or printed notice thereof, printed or circulated in this state, any such lottery, gift enterprise, policy or scheme or drawing in the nature of a lottery, whether the same is being or is to be conducted, held or drawn within or without this state, he shall be deemed guilty of a felony, and, upon conviction, shall be punished by imprisonment in the penitentiary for not less than two nor more than five years, or by im-prisonment in the county jail or workhouse for not less than six nor more than twelve months."

In the case of State ex inf. v. Globe-Democrat, 341 Mo. 862, the Supreme Court of this state in defining a lottery said at 1.c. 875:

"The elements of a lottery are: (1) consideration; (2) prize; (3) chance. * * *"

It is obvious that there is a prize in this case. In the case of State v. McEwan, 120 S.W. (2d) 1098, the Supreme Court in discussing the question of consideration said at l.c. 1101:

"We like the expressions of the United States Circuit Court of Appeals, Tenth Circuit, in the case of Affiliated Enterprises v. Gantz, 86 F. 2d 597, loc. cit. 599, involving an injunction proceeding to restrain an infringement of a copyright on 'bank night.' The scheme of 'bank night' there was the same as described in the information under consideration. The court said: 'The plan or system portrayed in the copyrighted sheets discloses more than once that an admission charge must not be exacted as a condition entitling one to participate in the drawing. Everyone, if he holds or does not hold or buys or does not buy a paid admission ticket to the show, is entitled to register at the entrance or in the lobby of the theatre, and he is thereupon designated by number opposite his name and must be permitted to have an equal chance with every other registrant in drawing the prize. This seems to be a subterfuge to escape the stigma of being a lottery. It is apparent that no one would give prizes if all participants in the drawings paid no admission fees. Show places are conducted for profit. The plan would be wholly worthless as a money making scheme, both to lessor and lessee. It is further apparent that when nonpaying participants and those who pay admissions are each given the same chance at drawing the prize the lucky number may represent one who paid to get in only because of his interest in the drawing. Indeed, that is more than probable. Then

how can it be maintained that the supposed evasion converted a lottery or gambling device into a mere altruistic opportunity and occasion to bestow a gift. If not within the literal definitions of those vices, plaintiff's plan and system is too closely akin to have the protection and assistance of a court of equity.'"

We believe it to be clear from this quoted provision that the Dartaway game has the element of consideration. The Supreme Court in the case of State ex inf. v. Globe-Democrat, cited supra, said at 1. c. 881:

"This tedious review of the cases shows the ingenuity with which efforts have been made to circumvent lottery laws by devising contests for a consideration which purport to be and in some degree actually are contests of skill, although their obvious, intended and widely disseminated appeal is to chance -- to the hope of winning by shrewd and lucky guessing disproportionately more than the contestant has put into the enterprise. These schemes have always been branded as mischievous. Indeed, an oftquoted statement from Long v. State, 74 Md. 565, 570, 22 Atl. 4, 12 L. R. A. 425, 28 Am. St. Rep. 268, is that 'it is very difficult, if not impossible, for the most ingenious and subtle mind to devise any scheme or plan, short of a gratuitous distribution of property, which has not been held by the courts of this country to be in violation of the lottery or gaming laws in force in the various States of the Union. Without going that far, it is safe to say that for the public good such schemes should be scanned by the courts with a scrutinous eye."

In such case the court further laid down the rule that in determining whether or not a lottery existed depends upon whether or not chance or skill is the dominant fact. If chance is the dominant fact, a lottery exists.

The court said at 1. c. 875:

"The elements of a lottery are: (1) consideration; (2) prize; (3) chance: * * * In England and Canada where the 'pure chance doctrine! prevails a game or contest is not a lottery even though the entrants pay a consideration for the chance to win a prize, unless the result depends entirely upon chance. In the United States the rule was the same until about 1904; but it is now generally held that chance need be only the dominant factor. (38 C. J., sec. 5, p. 291; 17 R. C. L., sec. 10, p. 1223; Waite v. Press Publishing Assn., 155 Fed. 58, 85 C. C. A. 576, 11 L. R. A. (N. S.) 609, 12 Ann. Cas. 319). Hence a contest may be a lottery even though skill, judgment or research enter thereinto in some degree, if chance in a larger degree determine the result. * * *"

In the case of Hernandez v. Graves, 4 S.W. (2d) 113, the Supreme Court of Florida held that a machine operated by a coin, in which the contestant had twenty seconds to select a correct answer, and if successful, received a pay-off, violated the Statute of Florida prohibiting slot machines. The court said at 1. c. 114:

"In this case the machine or device is a slot machine or device that is adapted for use in such a way that its operation as the result of the insertion of a coin involves an element of chance for the operator to win a stated cash prize if he correctly answers an unknown or unpredictable question in twenty seconds after it is disclosed by the machine, or to lose the coin inserted in the machine if the player does not, within twenty seconds after it is shown, correctly answer an unpredictable question posed by the machine and not known to or controlled by the player. Such operation of the machine affords an element of chance or unpredictable outcome of the operation of the machine involving the winning of a stated cash prize or the loss of the coin inserted in the machine. This

necessarily is a violation of the quoted statute. See Weathers v. Williams, 133 Fla. 367, 182 So. 764; Eccles v. Stone, 134 Fla. 113, 183 So. 628. The question is made known only after the coin has been inserted in the machine."

In the case of Commonwealth v. Lake, 57 N.E. (2d) 923, the Supreme Court of Massachusetts, Essex, described the game there in question as follows, at 1. c. 924:

"The alleged lottery was carried on by means of machines known as 'rotary merchandisers' set up in a store called 'Sportland' in charge of the defendant. This machine is about four feet high and thirty inches square. The top cover and the upper portions of the four sides are of glass, so that the 'playing field' in the upper part of the inside is visible. In the center of the 'playing field' is a hole, about five and one half inches in diameter, around which is 'a green felt area. rounding this is 'another area of green felt in the nature of a rim about six inches wide and flat.! When the machine is played this rim revolves around the center area 'in the manner of a turntable.' Upon the green felt areas are assorted prizes, such as cameras, watches, whistles, tape measures, and other objects. When a five cent piece is inserted in a slot the rim or 'turntable' slowly revolves with the objects upon it, but the operator can stop it at any point by pressing a button on the outside of the machine. When the rim is stopped in this way, a horizontal arm attached at its inner end to an axis at the rear of the machine automatically swings out across the 'playing field.' From the outer or free end of this arm is suspended a 'finger' the bottom of which, about one inch square, is the 'pusher.' As the arm swings, the 'pusher' travels in an are at a height of about a quarter of an inch over the surface of the rim and the inner area up to and across the hole in the center.

The object of the game is 'to have the "pusher" on the horizontal arm push in front of it the desired prize' from the 'playing field' into the hole, whence the object is delivered to the player through a chute. The pusher always travels in the same arc."

The court said with respect to this game at 1. c. 925:

" * * * Moreover, in determining which element predominates, where the game is not one of pure skill or of pure chance. some courts have held, we think rightly, that it is permissible in appropriate instances to look beyond the bare mechanics of the game itself and to consider whether as actually played by the people who actually play it chance or skill is the prevailing . factor. State v. Globe-Democrat Publishing co., 341 Mo. 862, 882, 110 S.W. 2d 705, 113 A.L.R. 1104; * * * So here, even if it might be possible by long practice to acquire a substantial degree of skill in stopping the revolving rim at a point or points where the swinging arm would work the desiredobjects toward the hole, the jury might well find that few, if any, of the persons who would play the machine at a place of public resort would be likely to possess any appreciable degree of skill; that to the great majority of players the game would be primarily a game of chance; and that the appeal of the game to the public would be a gambling appeal, with all the evil consequences of a lottery. Whether the game was predominantly one of chance or skill was a question for the jury."

In the case of People v. Settles, 78 Pac. (2d) 274, the Appellate Department, Superior Court, Los Angeles County, California, in discussing a dart game said at 1. c. 277:

" * * But here it appears that after covering a row of numbers on his card a player was required to throw a dart at a circle upon a board (a four-inch circle for men, a six-inch circle for women), and in order to win must land his dart within the circle in three throws. This introduced a new element into the game. Considerable evidence was introduced upon the question whether the landing of the dart within the circle in three throws was a matter of chance or skill. Upon this evidence the jury might reasonably have found either way. If they found that the landing of the dart in the circle was entirely a matter of skill, or that it depended more on skill than chance, they might then have concluded further that the skill so exerted, rather than the chance which covered the row of numbers, was the dominent element of the game, and acquitted the defendants."

We believe, therefore, that the game of Dartaway, as described in your opinion request, constitutes a lottery, if the dominant element in such game is one of chance rather than of skill.

CONCLUSION.

It is the opinion of this department that the game of Dartaway, as described in the opinion request, constitutes a lottery, if the dominant element, as such game is played, is chance instead of skill.

Respectfully submitted,

APPROVED:

C. B. BURNS, JR. Assistant Attorney General

J. E. TAYLOR Attorney General

CBB/feh

MOTOR VEHICLES - Safety Responsibility Law applicable to judgments for less than \$1,000.00 for property damages.

December 7, 1949

Mr. John H. Allison Supervisor, Motor Vehicle Registration Department of Revenue Jefferson City, Missouri

Attention: Mr. K. F. Davis

Financial Responsibility Division

Gentlemen:

We have received your request for an opinion of this department, which request is as follows:

"This department would like to have an opinion from your office as to whether a Plaintiff in a suit for damages, under the Motor Safety Responsibility Laws of 1945, can sue and secure judgment for damages in sums less than \$1000."

You enclose copy of a petition filed in the magistrate court of the City of St. Louis in which judgment for \$1,000.00, for damage to the plaintiff's automobile was sought against the defendant by reason of the defendant's truck colliding with plaintiff's automobile. A certificate of the clerk of the magistrate court shows that judgment was rendered on June 14, 1949, in favor of the plaintiff and against the defendant in the sum of \$458.16, together with costs amounting to \$9.50, making a total of \$466.66. The clerk further certified that such judgment remains unsatisfied.

In view of the enclosures we presume that the object of your inquiry is to determine whether or not the provisions of the motor vehicle safety responsibility law, Laws of Missouri, 1945, page 1207, should be invoked where a judgment has been recovered for property damages for a sum less than \$1,000.00.

Section 1 of the Act in question defines a judgment as follows:

"Any judgment which shall have become final by expiration without appeal of the time within which an appeal might have been

perfected, or by final affirmation on appeal rendered by a court of competent jurisdiction of any state or of the United States, upon a cause of action arising out of the ownership, maintenance or use of any motor vehicle, for damages, including damages for care and loss of services, because of bodily injury to or death of any person, or for damages because of injury to or destruction of property, including the loss of use thereof, or upon a cause of action on any agreement or settlement for such damages."

Section 4 (a) of the Act provides:

"The commissioner also shall suspend the license and all registration certificates or cards and registration plates issued to any person upon receiving authenticated report, as hereinafter provided, that such person has failed for a period of 30 days to satisfy any final judgment in amounts and upon a cause of action, as hereinafter stated."

Section 6 of the Act provides in part:

"Every judgment herein referred to shall, for the purposes of this act, be deemed satisfied:

* * * * * * * * * * * * * * *

"3. When \$1,000.00 has been credited upon any judgment or judgments rendered in excess of that amount for damage to property of others as a result of any one accident."

There is no direct provision in the Act to the effect that judgment for property damage in the amount of less than \$1,000.00 should not be grounds for invoking the provisions of the Act. The only provision of the Act from which such might be implied is subdivision 3 of Section 6, quoted supra. We feel, however, that no such meaning can be given this provision. In our opinion this provision means that in the event that a judgment in excess of \$1,000.00 is recovered for property damage, payment of \$1,000.00

on such judgment shall be deemed a satisfaction thereof for purposes of the Act. Nowhere is there any indication that the Act is not intended to apply in case of a judgment for less than \$1,000.00.

We call your attention to the fact that the record certified by the magistrate court does not clearly show that the judgment in this case had become final. The judgment was rendered on June 14, 1949, and under Section 130 of the magistrate court law, Laws of Missouri, 1945, page 765, 800, notice of appeal must have been filed within ten days of the judgment. However, the certificate of the magistrate does not show on its face that no notice of appeal was filed, and the certificate concerning the minute entries does not purport to be a full and complete record of such entries.

CONCLUSION

Therefore, it is the opinion of this Department that the provisions of the Motor Vehicle Safety Responsibility Act, Laws of Missouri, 1945, page 1207, must be invoked by the Director of Motor Vehicle Registration upon receipt of certificate showing judgment for less than \$1000.00 for property damages, resulting from the ownership, maintenance or use of a motor vehicle, when judgment has become final and has remained unsatisfied for thirty days.

Respectfully submitted,

APPROVED:

ROBERT R. WELBORN Assistant Attorney General

J. E. TAYLOR Attorney General

RRW/feh

FOOD AND DRUGS: SANITATION REGULATIONS:

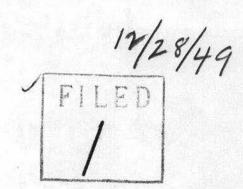
The Division of Health of the State of Missouri may not publish a closing order issued by said Division in any newspaper and they may not place a notice or plaque on the door or window of a closed establish-

December 28, 1949

(ment stating that said establishment has been closed for sanitary reasons.

Dr. C. F. Adams Director, Division of Health Bureau of Food and Drugs Department of Health and Welfare Jefferson City, Missouri

Dear Sir:



I.

This will acknowledge receipt of your letter in which you requested an official opinion from this department on the following questions:

"Under Article 3, Sanitation, Chapter 58 of the Revised Statutes of Missouri, 1939, under Sections 9898 through 9901, the Food and Drug Commissioner or his authorized deputy is permitted to issue a closing order in certain food handling establishments when such establishments maintain or operate their places of business in such manner as to constitute a menace to the public health.

"1. 'If a written closing order is issued, may we legally send a copy of such an order to the local newspapers for publication?'

"2. 'If such action is not legal, may we legally place a plaque on the door or windo of such a closed establishment stating that this establishment has been closed by the Bureau of Food and Drugs, State Health Department, for sanitary reasons?!"

II.

In answer to your first question we cannot find any statutory authority for you to publish a copy of any closing order in any newspaper. You cannot publish such a notice in a newspaper without direct or express authority from the General 'v of this

state. We have carefully read Article III, of Chapter 58 of the Revised Statutes of Missouri, 1939, and we cannot find any provision therein for publishing a notice of closing an establishment for violation of the sanitary regulations set forth in that article. Such a notice, if published, might be libelous if the facts did not substantiate that unsanitary conditions existed in said establishment to justify such closing orders. A general notice of closing of all establishments dealing with the public, in the event of an epidemic, might be proper. Appropriate health regulations will always be sustained where danger of epidemic actually exists, but extraordinary measures are not suitable, and are not regarded as reasonable at ordinary times or in individual cases. (39 C.J.S., p. 825.)

In answer to your second question, we have carefully considered Sections 9898; 9899; 9901 and 9904 of said Article III of Chapter 58 of the Revised Statutes of Missouri, 1939. Said sections do not provide for the posting of a copy of the closing order on the door or window or entrance of the establishment closed. We realize that Section 9735, R.S. Mo. 1939, makes it the duty of the State Board of Health, now the Division of Health of the Department of Public Health and Welfare, to safeguard the health of the people in the state, counties, cities, villages and towns. We also realize that the Supreme Court of Missouri has held on different occasions that "it is the duty of the State Board of Health 'to safeguard the health of the people in the state, counties, cities, villages and towns."
Riggs v. Springfield, 344 Mo. 437, 126 S.W. (2d) 1145; State ex rel. Shartel v. Humphreys, 338 Mo. 1099, 93 S.W. (2d) 924. It could be argued that it is necessary to post a notice of the closing of an establishment for violation of the sanitation regulations in order to protect the health of the people who might enter therein if the owner or operator of the establishment violated the closing order and continued to do business.

We realize that the Missouri Supreme Court has held that powers conferred upon boards of health to enable them effectually to perform their important functions in safeguarding the public health should receive a liberal construction (State ex rel. Horton v. Clark, 9 S.W.(2d) 635, 320 Mo. 1190, 1.c. 1199)

But the Legislature has prescribed the procedure and method for the enforcement of the sanitation closing order by Section 9904, R. S. Mo. 1939, which provides:

"Any person who shall fail, or refuse, to obey any order of the state food and drug commissioner to close any place, or places, mentioned in section 9898, or who shall exhibit or expose for sale in any show-window upon any sidewalk, any vegetables or other articles or commodities whatsoever intended for human food, in violation of any order of the food and drug commissioner, or who shall, in any way, resist or interfere with the state food and drug commissioner in the enforcement of this chapter, or any order of the state food and drug commissioner made pursuant to the authority of this law, shall be deemed guilty of a misdemeanor."

This section makes it a criminal offense to violate the order of the Division of Health closing an establishment for violation of sanitary regulations.

The Courts cannot enlarge and change the scope of the statutes. State ex rel. Knisely v. Holtcamp, 181 S.W. 1007.

The Courts will not import language into the body of a legislative enactment not necessarily required in order to accomplish the purpose for which it was enacted. Head v. N.Y. Life Ins. Co., 147 S.W. 827, 241 Mo. 403, 34 Supreme Court 879; Mills v. Allen, 128 S.W. (2d) 1040, 344 Mo. 743; Sayles v. K.C. Structural Steel Co., 128 S.W. (2d) 1046, 344 Mo. 756.

A statute which is penal in nature must be strictly construed. McClaren v. G. S. Robbins, 162 S.W. (2d) 856, 349 Mo. 653.

This also means that the Department does not have the power to provide under its rule-making power a new method of enforcement of said closing order or to provide additional penalties.

Whenever a statute limits a thing to be done in a particular form, it necessarily includes in itself a negative, namely, that the thing shall not be done otherwise. Dietrich v. Jones, 53 S.W. (2d) 1059, 227 Mo. App. 365. The Supreme Court in Keane v. Strodtman, 18 S.W. (2d) 896, construed Section 8702, R.S. Mo. 1919, and held:

"Certainly where, as at bar, the statute (section 8702) limits the doing of a particular thing to a prescribed manner, it necessarily includes in the power granted the negative that it cannot be otherwise done. This is the general rule as to the application of the maxim. Even more relevant under the facts

in this case is the interpretation given to it by the Kansas City Court of Appeals in Dougherty v. Excelsior Springs, 110 Mo. App. 623, 626, 85 S.W. 112, 113, to this effect; 'That when special powers are conferred, or where a special method is prescribed for the exercise and execution of a power,' that exercise is 'within the provision of the maxim * * *and * * * * forbids and renders nugatory the doing of the thing specified except in the particular way pointed out.'"

The Supreme Court in State ex rel. Tummons v. Cox, 282 S.W. 694 said: (1.c. 695)

"* * *a reasonable construction of an administrative statute is that in its application it is to be limited to its plain, unequivocal terms. * * *"

The posting of a notice of closing upon the entrance of a business establishment would cause a serious loss of business even after the cause for the closing had been corrected and the order of closing had been removed, and would therefore be an additional penalty upon the owner or operator of such a business.

We have studied the opinion written by John R. Baty, Assistant Attorney General, on March 10, 1949, to William Lee Dodd, prosecuting attorney of Ripley county, State of Missouri, in which this department considered the rule-making power of the Division of Health and the use of the writ of injunction to prevent the continuance of a public nuisance or to prevent the creation of a public nuisance. We assume you have a copy of this opinion.

We believe that the rule-making power set forth in this opinion cannot be extended to include the right to post a notice of closing upon the entrance of a business establishment ordered closed.

III.

CONCLUSION

It is, therefore, the opinion of this department that the

Division of Health of the State of Missouri may not publish a closing order issued by said Division in any newspaper and they may not place a notice or plaque on the door or window of a closed establishment stating that said establishment has been closed for sanitary reasons.

Respectfully submitted,

STEPHEN J. MILLETT

Assistant Attorney General

APPROVED:

J. E. TAYLOR Attorney General

SJM:mw

COUNTY SURVEYOR:

COUNTY HIGHWAY ENGINEER:

County court is required to furnish county surveyor with such surveying equipment as is necessary for the performance of his official duties. No authority to appoint a county foreman under provisions of Section 8655, Laws, 1945, page 1493.

January 18, 1949

Honorable Roderic R. Ashby Prosecuting Attorney Mississippi County Charleston, Missouri FILED

Dear Sir:

This is in answer to your letter of recent date requesting an official opinion of this department and reading as follows:

"A, a County in Missouri, has a population of 18,000. At the General Election 1948 B was duly elected to the office of County Surveyor of that County.

"B, has taken that office since January 1, 1949.

"C, the County Court has appointed D, a permanent County Highway Foreman at a salary of \$300.00 per month under Section 8655 of the 1945 Session Laws permitting them to do this instead of using B as such. All of the County equipment was inventoried to D. D has an office which B shares with D. B's salary is fixed on a fee basis. There is not enough fee work in this county to provide B a livable wage.

"Questions:

"Is B entitled to have furnished him the equipment necessary to discharge his duties as County surveyor plus an office.

"Should C appoint a County Engineer instead of a County Foreman?"

In answer to your first question, we are enclosing an official opinion of this department rendered under date of March 23, 1939, to David A. Dyer.

Section 8655, Laws of Missouri, 1945, page 1493, provides as follows:

"The county courts of each county in this state in classes two, three and four are hereby authorized and empowered to appoint and reappoint a highway engineer within and for their respective counties at any regular meeting, for such length of time as may be deemed advisable in the judgment of the court at a compensation to be fixed by the court. The provisions of this article shall apply only to counties of classes two, three and four."

We assume from your letter, of course, that the man as county foreman is performing the duties enjoined by law upon the county highway engineer. Section 8655 provides specifically the power and authority of the county court to appoint a county highway engineer. It does not provide any authority for the county court to appoint a foreman to perform the duties of the county highway engineer. Since many duties are by law specifically enjoined upon the county highway engineer and he is required by law to give a bond, it is our opinion that under the provisions of Section 8655, there is no authority of the county court to employ a county foreman to perform the duties of the county highway engineer.

CONCLUSION

It is the opinion of this department that it is the duty of the county court to furnish the county surveyor with such surveying equipment as may be reasonable and necessary for the performance of his official duties as county surveyor. It is further the opinion of this department that the county court is not authorized, under the provisions of Section 8655, Laws of Missouri, 1945, page 1493, to employ a county foreman to perform the duties enjoined by law upon the county highway engineer.

Respectfully submitted,

APPROVED:

C. B. BURNS, JR. Assistant Attorney General

J. E. TAYLOR Attorney General

CBB:VLM

COUNTIES: ELECTIONS:

Election called within the county to establish a public county health center under House Bill 280, Laws of Mo. 1945, page 1969, must be held at the usual voting places in the county for voting upon county officers.

February 10, 1949

2-18

FILED

Honorable Roderic R. Ashby Prosecuting Attorney Charleston, Missouri

Dear Mr. Ashby:

We have your two communications of recent dates in which you request an opinion from this department touching the facts outlined by you in the following language:

"A special election has been called in our County on the County Health Unit proposition. The election has been called for April 5, 1949, which is the date of the school election. Your office has heretofore advised us that it will be necessary to have the polls open all during the day rather than just part of the day as is ordinarily done at a school election.

"We would like to know whether or not the County Court can order that the special election be held at the polling places where the school elections are being held. In other words, ordinarily we would have precincts in the various townships, but the school elections will be held at each school and we would like to know whether or not at such a special election the County Court would have authority to designate those school houses as voting precincts, and have the election held at those polling places. We can see no reason why the polling places which are used at a general election should be necessary at this special election, and would much prefer to use the school houses where the school elections are being held."

"Supplementing my letter of January 29, 1949, be advised that the Mississippi County Public Health Unit is one organized under House Bill 280 being passed in 1946 and being part of the Laws of

Missouri, 1945 at page 969."

Your request presents the single question: May the county court of Mississippi County, Missouri, having heretofore called a special election to be held on April 5, 1949, pursuant to authority contained in House Bill 280, Laws of Mo. 1945, page 969, order that polling precincts to be used in such public election be those which are to be in use on said date for the annual elections in such counties?

The Act we are construing is House Bill No. 230, enacted by the 63rd General Assembly, Laws of Mo. 1945, page 969. Section 1 of this Act provides:

"Any county or group of counties, subject to provisions of the Constitution of the State of Missouri, may establish, maintain and manage and operate a public county health center in the following manner: Whenever the county court or courts shall be presented with a petition signed by ten per cent or more of the qualified voters in the county or counties affected as determined by the number of votes cast for governor at the preceding general election, asking that an annual tax be levied for the establishment, building, maintaining of a public health center and the maintenance of such personnel as may be needed for the operation of such center and shall specify in their petition, the maximum amount of money proposed for said purposes, such county court or courts shall submit the question to the qualified voters of the county or counties at the next general election to be held in the county or counties or at a special election called for that purpose, first giving ninety days! notice thereof in one or more newspapers published in the county or counties, if any be so published, and if not so published, by posting written or printed notices in each township of the county or counties, which notice shall include the text of the petition and state the amount of the tax to be levied upon the assessed property of said county or counties, which tax shall not exceed one (1) mill on the dollar, for a period of time not exceeding twenty years, and be for the issue of county bonds to provide funds for the purchase of a site or sites, the erection

Hon. Roderic R. Ashby

thereon of a public health center and for the support of the same including necessary personnel; which said election shall be held at the usual voting places in the county or counties for voting upon county officers, and shall be canvassed in the same manner as the vote for county officers is canvassed. (Underscoring ours.)

Language contained in the underscored lines of the above quoted section makes it mandatory that the called election be held in the usual voting places used in the county in voting upon county officers. Permissive language is not used in the section and the clear import of the language is not to be disregarded. It is not necessary in this instance to bring into play technical rules for the interpretation of statutes. We think the language of this section quoted above is plain and unambiguous and the intent of the Legislature is clearly evident touching the places where the election will be held.

CONCLUSION

It is the opinion of this department that an election duly called pursuant to authority contained in House Bill 280, Laws Missouri 1945, page 969, must be held in the polling precincts which constitute the usual voting places in the county for voting upon county officers, and such polling precincts may not be restricted to those being used within the county on the day prescribed for holding of annual school elections.

Respectfully submitted,

JULIAN L. O'MALLEY Assistant Attorney General

APPROVED:

J. E. TAYLOR Attorney General

JLO'M: mw

SCHOOLS: Director need not be qualified voter.

May 2, 1949

5-11

FILED

Mr. Thomas L. Arnold Ass't Prosecuting Attorney Scott County Benton, Missouri

Dear Sir:

We have received your request for an opinion of this department on the following questions:

> "Some problems have arisen over the recent school elections held in one of the Scott County School Districts. Therefore, I would appreciate very much an opinion from your office on the following questions.

"1, Must a director elected under section 10469, MRS 1939, in addition to the qualifications set out in said section, be also a qualified voter as set out in Laws of Missouri 1943, page 555, Section 1 (in particular, can be a candidate and be elected when he has been convicted of a felony)?

"2. Is a person disqualified as a voter under Laws of Missouri, 1943, page 555, Section 1, who has been convicted of a felony under the laws of a sister state (Arkansas)? And if so, for how long does the disqualification continue (until full pardon, until sentence is served or parole expires)?"

Section 10420, R. S. Mo. 1939, prescribes the qualifications of directors of a common school district as follows:

"The government and control of the district shall be vested in a board of directors composed of three members, who shall be citizens of the United States, resident taxpayers of the district, and who shall have paid a state and county tax within one year next preceding his, her or their election, and who shall have resided in this state for one year next preceding his, her or their election or appointment, and shall be at least twenty-one years of age. * * *

Section 10469, R. S. Mo. 1939, prescribes similar qualifications of city, town and consolidated school districts with the exception of the fact that the minimum age is fixed at thirty years.

Neither of these sections requires expressly that a person be a qualified voter in order to be eligible to serve as a school district director. Such requirement was formerly found in the statutes prescribing qualifications for such office. Sections 10847 and 10867, R. S. Mo. 1909, which correspond to Sections 10420 and 10469, R. S. Mo. 1939, contain such provision. However, the requirement was eliminated by an amendatory act found in Laws 1917, page 505, and the sections in question were enacted in their present form at that time. The title of the amendatory act discloses that the amendment was made in order to permit women who were not at that time eligible to vote to serve as directors.

In view of the foregoing history of the sections, we think it clear that a person need not be a qualified voter in order to be eligible to serve as a school district director.

However, your inquiry is directed to the question of whether or not a person who has been convicted of a felony is eligible to such office. There are in the Criminal Code of this state numerous provisions making a person convicted of almost any of the felonies under the laws of this state ineligible to hold any "office of honor, trust or profit within this state." Sections 4322, 4357, 4427, 4561, 4601 and 4796, R. S. Mo. 1939.

We find no cases in this state dealing with the question of whether or not the office of school district director is an "office of honor, trust or profit" within the meaning of these statutory provisions. However, the position has been held to be a state office (State ex inf. Sutton v. Fasse, 189 Mo. 532, 88 S.W. 1) and it has been held to be an "office of trust" within the meaning of statutory provisions in other states (State v. Jones, 143 Tenn. 575, 224 S.W. 1041). See State ex rel. Brickey v. Nolte, 350 Mo. 842, 169 S.W. (2d) 50.

Such disability may be removed by a pardon by the Governor (Section 9227, R.S. Mo. 1939). When discharge from the penitentiary is under the three-fourths rule, upon a first conviction, civil disabilities terminate at the end of two years from such discharge (Section 9086, R.S. Mo. 1939).

In regard to your second inquiry, the Supreme Court of this state held in the case of State ex rel. Barrett v. Sartorious, 351 Mo. 1237, 175 S.W. (2d) 787, that the constitutional (Section 2 of Article VIII of the Constitution of 1945) and statutory (Section 11469, R.S. Mo. 1939, Laws 1943, page 555) provisions relating to disfranchisement for a conviction for a felony included a conviction for any offense which is a felony under the laws of the jurisdiction in which the conviction was obtained. The court in that case was considering particularly a conviction in Federal court for an offense which was not a felony under Missouri law, and the court held that it was such a conviction as would result in disfranchisement under the above constitutional and statutory provisions. The same principle would appear to be applicable to convictions obtained in other states.

We find no cases in which the question of the termination of such disability by reason of conviction in a foreign jurisdiction has been considered by the courts of this state. However, in view of the fact that the disability in such case is imposed by reason of Section 11469, R.S. Mo. 1939, its removal would likewise be governed by such section and, therefore, the disability would continue until pardoned by the Governor.

Conclusion.

Therefore, it is the opinion of this department that:

- (1) A school district director need not be a qualified voter, but that a person convicted of an offense under the laws of this state, which conviction renders him disqualified to hold any "office of honor, trust or profit," is ineligible to serve as school district director unless such disability is removed in accordance with statute.
- (2) Conviction of felony in a foreign jurisdiction disqualifies a person from voting in this state, and such disability may be removed only by pardon by the Governor.

Respectfully submitted,

APPROVED:

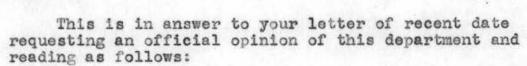
ROBERT R. WELBORN Assistant Attorney General COUNTY COLLECTORS: TAXATION:

Under provisions of House Bill No. 56 of 65th General Assembly, collectors do not receive additional compensation of one-half of one per cent of all current taxes collected on the real estate owned by a utility.

August 2, 1949

Mr. Hugh M. Atwell Prosecuting Attorney Miller County Eldon, Missouri

Dear Sir:



"Will you please give me an opinion on the recent act of the House Bill No. 56.

"Section 3. provides that Collectors in Third Class Counties shall receive one-half of one per cent of all current taxes collected, ---- exclusive of all current railroad and utility taxes collected as compensation for mailing statements and receipts, under this Act.

Question

"Is the collector entitled to the above compensation on the taxes on the real estate owned by a utility that is carried on the real estate books?"

Section 3 of House Bill No. 56, 65th General Assembly, provides as follows:

"The collectors in third class counties shall receive one-half of one per cent of all current taxes collected, including current delinquent taxes, exclusive of all current railroad and utility taxes

collected, as compensation for mailing said statements and receipts. Said compensation shall be exclusive of and unaccountable in the maximum commissions now provided in Sections 11106 and 11107, Revised Statutes of Missouri, 1939."

Section 19, Laws of Mo. 1945, page 1825, provides as follows:

"Within ten days after the county court shall have levied the taxes on railroad property, as prescribed in the two preceding sections, the county clerk of such county shall extend the same on a separate tax book, to be known as the railroad tax book, in which he shall place, first, the total valuation of the roadbed and rolling stock of each railroad company, as assessed, equalized and apportioned to such county by the State Tax Commission, with the amount of state, county, municipal, township, city, town or village school taxes, and taxes for the erection of public buildings and for other purposes, levied thereon by the county court, stated separately; second, a description of each tract of land, town lot, or other real estate, including the machine and workshops and other buildings in numerical order, and tangible personal property, as returned by local assessors, and the amount of state, county, municipal, city, town or village school taxes, and taxes for the erection of public buildings, and for other purposes, levied thereon, stating each separately, and crediting school taxes and taxes for the erection of public buildings, and for other purposes, to the proper district or municipality."

(Emphasis ours)

Section 11295, Laws of Mo. 1945, page 1852, which section relates to taxes on utilities, provides in part as follows:

"* * * And taxes levied thereon shall be levied and collected in the manner as is now or may hereafter be provided by law for the taxation of railroad property in this state, and county courts, county boards of equalization and the State Tax Commission are hereby required to perform the same duties and are given the same powers in assessing, equalizing and adjusting the taxes on the property set forth in this section as the said courts and boards of equalization and State Tax Commission have or may hereafter be empowered with in assessing, equalizing, and adjusting the taxes on railroad property; and the president or other authorized officer of any such bridge, telegraph, telephone, electric power and light companies, electric transmission lines, pipe line companies, or express company or the owner of any such toll bridge, is hereby required to render statements of the property of such bridge, telegraph, telephone, electric power and light companies, electric transmission lines, pipe line companies, or express companies in like manner as the president, or other authorized officer of the railroad company is now or may hereafter be required to render for the taxation of railroad property. * * *"

Since it is provided by statute that the taxes on real estate owned by a railroad are to be entered in the railroad tax book and therefore are "railroad" taxes and since it is provided that the utility taxes shall be levied and collected in the manner as is now or may hereafter be provided for taxation of railroad property and taxes on real estate of a utility are "utility" taxes, we believe it to be clear that under the provisions of Section 3 of House Bill No. 56 that the extra compensation provided by such House Bill does not apply insofar as taxes on the real estate owned by a utility are concerned.

CONCLUSION

It is the opinion of this department that the extra one-half of one per cent paid to county collectors on all current taxes collected as provided by House Bill No. 56 of the 65th General Assembly is not paid the collector for taxes collected on the real estate owned by a utility.

Respectfully submitted,

CBB:nm

C. B. BURNS, JR. Assistant Attorney General

APPROVED:

J. E. TAYLOR ATTORNEY GENERAL P.7:3/18/49

MOTOR VEHICLES: Two per cent use tax on moter vehicles must be paid before Missouri title is obtained where person

TAXATION: applying for title received motor vehicle as a gift from person who bought vehicle and paid state sales tax on such vehicle in a foreign state, when no Mo. sales tax

has been paid on such motor vehicle.

February 4, 1949

2-8

Mr. G. H. Bates, Director Department of Revenue Division of Collection Jefferson City, Missouri

Dear Sir:

This is in answer to your letter of recent date requesting an official opinion of this department and reading as follows:

"A young man graduating from school was given a car by his father as a graduation present but being unable to obtain the car in Missouri, he had another son purchase said car out of state, at which time a one per cent sales tax was paid in the state of purchase.

"The grantee now objects to paying the Use Tax as provided for in H. B. 258 and has asked that we secure an opinion from your office, because our Department had ruled that since the Missouri Sales Tax had not been paid by the donor, the grantee would be required to pay the tax upon titling said car in Missouri."

In a telephone conversation, you further stated that there is no contention made in this case that the person who is making the gift of the automobile in this case moved into Missouri more than 90 days after the time it was registered in such foreign state.

Subsection (c) of Section 11412, Laws of Missouri, 1947, Volume II, page 433, provides, in addition to all other taxes levied and imposed for the privilege of using the highways of this state, for the levying of a use tax equivalent to two per cent of the purchase price of a motor vehicle on all new and used motor vehicles purchased or acquired for use on the highways of this state which are required to be registered under the laws of this state. Such subsection further provides that the Director of Revenue shall issue an official

certificate of title and register the same only when the applicant presents evidence showing the Director that the motor vehicle is not subject to the tax, or if the vehicle is subject to the tax, it must be paid before the certificate of title is issued.

The tax imposed by subsection (c) of Section 1112 does not apply to the motor vehicles specifically exempted by subsection (d) of Section 1112. We find that the motor vehicle for which a Missouri title and registration is sought in this case does not come within any of the exemptions listed in subsection (d) of Section 1112, and is, therefore, subject to the tax imposed by subsection (c). The fact that the donor of a gift or the person who received title to the motor vehicle in some other state paid a sales tax upon such motor vehicle to such other state does not affect this matter in any way since only motor vehicles upon which the Missouri Sales Tax has been paid are exempt from the use tax under the provisions of subsection (d) of Section 1112, relative to payment of sales taxes.

CONCLUSION

It is the opinion of this department that where application is made for a certificate of title and registration of a motor vehicle which was received by a person as a gift from another person who purchased such motor vehicle in a foreign state and paid the sales tax to the foreign state thereon, but on which motor vehicle no Missouri Sales or use tax has been paid, that such person receiving the motor vehicle as a gift must pay to the Director of Revenue, before a certificate of title is issued, the use tax imposed by subsection (c) of Section 11412, Laws of Missouri, 1947, Volume II, page 433.

Respectfully submitted,

C. B. BURNS, JR. Assistant Attorney General

APPROVED:

J. E. TAYLOR Attorney General

CBB:VLM

CRIMINAL COSTS: Magistrate fee of \$2.50 (Laws, 1947, Vol. 1, page 488) is a proper charge against the state, county or other person liable therefor. Duty imposed on magistrate to charge, collect and/or MAGISTRATES: account for magistrate fee of \$2.50 provided by Laws 1947, Vol. 1, page 488. February 9. 1949 2-28 Honorable J. T. Baty Clerk of the Magistrate Court Scott County Benton, Missouri Dear Sir: This will acknowledge your request of recent date for an official opinion which reads as follows: Have quite a lot of criminal cases filed by individual and the Prosecuting Attorney

Have quite a lot of criminal cases filed by individual and the Prosecuting Attorney and same are placed on the docket and warrant issued for their arrest. Some of the cases have been on file for some time and none have been apprehended as in most cases they have left the State. The Prosecuting Attorney has dismissed them. Please advise me by return mail if I am supposed to charge the \$2.50 Magistrate fee to the County Court where they have not been apprehended and have been dismissed by the State."

A \$2.50 fee, referred to in your request for an opinion, was specifically provided for by an act passed by the 64th General Assembly of Missouri, in Senate Bill No. 108, Laws 1947, Vol. 1, page 488, with an emergency clause, which was approved by the Governor on June 2, 1947, and became effective on that date. Section 1, sub-section (3) of said law provides as follows:

"All such fees shall be charged on behalf of the State or county paying salary of such clerk or magistrate and shall be paid and accounted for in the same manner as magistrate fees."

The law above quoted constitutes a positive directive to the magistrate to charge and collect and/or account for such fee as criminal costs are charged and collected under the applicable statutes. In determining the liability for such criminal costs attention must be directed to the general law of Missouri covering

costs in criminal cases, such law being found in Article 20, Chapter 30, R. S. Mo. 1939, and to related statutes having special application to the fact situations outlined in your inquiry.

In an opinion rendered by this office to Honorable Mark Wilson, Judge of the Magistrate Court of Henry County, Missouri, on November 12, 1947, the following was stated relative to dismissals by the Prosecuting Attorney:

"If, after the prosecution has commenced, the prosecuting attorney wishes to dismiss the charges brought against the defendant, he must enter a nolle prosequi. For the purpose of criminal costs statutes, a nolle prosequi is considered the same as if the defendant had been acquitted.

* * * *."

For the purpose of disposing of your request, this department must consider that the cases dismissed in the Magistrate Court of Scott County were dismissed by the Prosecuting Attorney entering a nolle prosequi as to each of such cases. Consequently, all defendants named in those cases are considered to have been acquitted.

Reviewing all sections bearing on our inquiry, contained in Article 20, page 30, R. S. Mo. 1939, such article being entitled "Costs in Criminal Cases", we can at once disregard Sections 4220, 4221 and 4222, as being applicable only in those instances where the defendant has been convicted and sentenced. Section 4223, R. S. Mo. 1939, provides:

"In all capital cases, and those in which imprisonment in the penitentiary is the sole punishment for the offense, if the defendant is acquitted, the costs shall be paid by the state; and in all other trials on indictments or information, if the defendant is acquitted, the costs shall be paid by the county in which the indictment was found or information filed, except when the prosecutor shall be adjudged to pay them or it shall be otherwise provided by law."

The above quoted statute must be looked to for the general rule to be followed in determining liability for costs in the event of acquittals in (1) all capital cases, and in (2) those cases in which imprisonment in the penitentiary is the sole punishment for the offense and in (3) all other criminal proceedings on indictment or information. Cases falling within the first two classifications

result in the costs being a charge against the state, and the third classification makes the charge upon the county in which the indictment was found or the information filed. Having clarified the general rule set out in the statute we find that such rule is modified by the exception stated therein which provides that the rule stated shall apply "except when the prosecutor shall be adjudged to pay them or it shall be otherwise provided by law."

The word "prosecutor" as used in our criminal costs statutes, whether such statutes be of general or special application, has reference to an individual, other than the prosecuting official, whose action initiates the complaint resulting in the prosecution. A reading of Section 3900, R. S. Mo. 1939, supports this view. This section provides as follows:

"When the information is based on an affidavit filed with the clerk or delivered to the prosecuting attorney, as provided for in section 3895, the person who made such affidavit shall be deemed the prosecuting witness, and in all cases in which by law an indictment is required to be indorsed by a prosecutor, the person who makes the affidavit upon which the information is based, or who verifies the information, shall be deemed the prosecutor; and in case the prosecution shall fail from any cause, or the defendant shall be acquitted, such prosecuting witness or prosecutor shall be liable for the costs in the case not otherwise adjudged by the court, but the prosecuting attorney shall not be liable for costs in any case." (Underscoring ours.)

Section 3900, R. S. Mo. 1939, supra, not only discloses who is to be deemed the prosecuting witness when an information is based on an affidavit, but also designates such person as the "prosecutor" in those cases in which by law an indictment is required to be endorsed by a prosecutor, and further provides that in such cases if the prosecution shall fail from any cause, or the defendant shall be acquitted, such prosecuting witness or prosecutor shall be liable for the costs in the case not otherwise adjudged by the court.

Consideration must now be given to that class of cases wherein an indictment must be endorsed by the prosecutor. Section 3931, R. S. Mo. 1939, provides:

"No indictment for any trespass against the person or property of another, not amounting to a felony, except for petit larceny, and no indictment for

the disturbance of the peace of a person, or for libel or slander, shall be preferred unless the name of a prosecutor is indorsed as such thereon, thus: 'A B, prosecutor,' except where the same is preferred upon the information and testimony of one or more grand jurors, or of some public officer in the necessary discharge of his duty. If the defendant be acquitted or the prosecution fails, judgment shall be entered against such prosecutor for the costs."

Although the rule stated in Section 3931, R. S. Mo. 1939, supra, refers only to indictments by grand juries, we point it out to draw a parallel between such rule and the rule now found at Section 3856.27, Article 4, Chapter 30, Mo.R.S.A. (Laws 1945, p. 750) which must be followed in proceedings before magistrates in misdemeanor cases. Section 3856.27, Mo. R.S.A. provides:

"When the proceedings are prosecuted before any magistrate, at the instance of the injured party, for the disturbance of the peace of a person, or for libel or slander, or for any trespass against the person or property of another, not amounting to a felony, except for petit larceny, the name of such injured party shall be entered by the magistrate on his record as a prosecutor; and if the defendant shall be discharged or acquitted, such prosecutor shall be adjudged to pay the costs not otherwise adjudged; and in every other case of acquittal, if the magistrate or jury trying the case shall state in the finding that the prosecution was malicious or without probable cause, the magistrate shall enter judgment for costs against the prosecution or party at whose instance the information was filed, and shall issue execution therefor; but in no case shall the prosecuting attorney be liable for costs. In other cases of discharge or acquittal the costs shall be paid by the county, except when the prosecution is commenced by complaint and the prosecuting attorney declines to file information thereon, in which case the proceedings shall be dismissed at the cost of the party filing the complaint."

Section 4224, R. S. Mo. 1939, places liability for costs on the "prosecutor" where a prosecution is instituted to recover a fine, penalty or forfeiture, in those cases when the defendant is acquitted. This section has application to offenses personal, and where the informant is the person injured.

Section 4225, R. S. Mo. 1939, has reference to the type of prosecutions mentioned in Section 4224, R. S. Mo. 1939, when instituted by a public officer whose duty it is to institute the same. In cases of acquittel under this section, the county pays the costs; or, if the defendant is convicted and unable to pay the costs the county shall pay all costs, except such as were incurred by defendant.

Section 4226, R. S. Mo. 1939, provides:

"In all cases where any person shall be committed or recognized to answer for a felony, and no indictment shall be found against such person, the prosecutor, or person on whose oath the prosecution was commenced, shall be liable for all the costs incurred in that behalf; and the court shall render judgment against such prosecutor for the same, and in no such case shall the state or county pay such costs."

The reason behind the rule set forth in Section 4226, R. S. Mo. 1939, supra, is readily evident. Prosecutions instituted by individuals bearing malice toward defendants would become burdensome if the rule were not in effect. Section 4227 and Section 4228, R. S. Mo. 1939, are additional safeguards against malicious and baseless prosecutions.

In the preceding paragraphs we have pointed out that prosecutions properly dismissed by the prosecuting attorney in the magistrate court are to be deemed acquittals within the criminal costs statute of Missouri, and have further pointed out and discussed the general and special statutes to be considered in determining liability for costs in those cases, whether they be felonies or misdemeanors, which have been properly dismissed by the prosecuting attorney before the defendant has been examined in the magistrate court. The application of these rules would be as varied as the circumstances bringing them into play. Without being cited a specific instance wherein costs are to be taxed, it is not feasible to suggest applications of the rules outlined.

CONCLUSION

It is, therefore, the opinion of this department that when prosecutions have been properly dismissed in the Magistrate Court of Scott County, Missouri, by the Prosecuting Attorney of said county, due to failure to apprehend the defendants, the magistrate fee of \$2.50 provided for by the enactment of Senate Bill No. 108 by the 64th General Assembly of Missouri, Laws 1947, Volume 1, page 488, must be made a proper charge against the State, county or party liable therefor, and so appear in the cost bill to be certified to the Clerk of the Circuit Court under the provisions of Section 4246, R. S. Mo. 1939, and all of said fees are to be paid and accounted for in the same manner as other magistrate fees.

Respectfully submitted,

JULIAN L. O'MALLEY Assistant Attorney General

APPROVED:

J. E. TAYLOR Attorney General

JLO'M:mw

MAGISTRATES:

Office of extra magistrate may be abolished without regard to term of incumbent.

February 23, 1949



2.24

Hon. Emmett L. Bartram Prosecuting Attorney Nodaway County Maryville, Missouri

Dear Sir:

We have received your request for an opinion of this department, which request is as follows:

"Nodaway County now has two divisions of the Magistrate Court. Division No. 2 was created about two years ago by order of the Circuit Court. Nodaway County is a third class county.

"The Judge of this Division was just elected at the last General Election, that is in November of 1948. He now has qualified and has taken office pursuant to his election.

"The question before us is: Can
Division No. 2 be abolished during
the tenure of this Judge's term and
if the Circuit Court Judge rules to
abolish the office, would this automatically dispense with the county
paying the salary of the newly elected
Magistrate Judge after the order of
decreasing the number of Magistrate
Courts."

Section 18 of Article V of the Constitution, 1945, provides, in part:

" * * * According to the needs of justice the foregoing number of magistrates in any county may be increased by not more than two, or such increased number may be decreased, by order of the circuit court on petition, and after hearing on not less than thirty days public notice.

Pursuant to this constitutional provision, the Legislature enacted the following provision (Laws of 1945, page 765, Section 1):

" * * * According to the needs of justice, in counties of more than 30,000 inhabitants, the foregoing number of magistrates in any county may be increased by not more than two, or such increased number may be decreased, by order of the circuit court, on petition of five hundred qualified voters of the county, and after hearing on not less than thirty days public notice to be published in some newspaper of general circulation in the county once each week for three consecutive weeks immediately preceding said hearing. No petition for additional magistrate shall be granted unless the circuit court finds from the evidence heard that the administration of justice requires that the number of magistrates be increased, and that the need for additional magistrate or magistrates is not temporary but appears to the circuit court that a permanent need exists. Such additional magistrates shall be appointed by the governor when authorized by proper order of the circuit court certified to him, and such appointee shall hold office until the next general election at which election a successor shall be elected to hold office for the unexpired term or full term as the case may be, said terms to be identical with that of other magistrates."

See State ex rel. Randolph County v. Walden, 357 Mo. 167, 206 S. W. (2d) 979.

The general rule concerning the abolition of public offices is set out in 42 Am. Juris., Public Officers, Section 33, page 904, as follows:

"The power to create an office generally includes the power to modify or abolish it. The two powers are essentially the same. * * *

"The power to abolish an office may be exercised at any time and even while the office is occupied by a duly elected or appointed incumbent, for there is no obligation on the legislature or the people to continue a useless office for the sake of the person who may be in possession thereof. By abolishing the office, the legislature does not deprive the incumbent of any constitutional rights, for he has no contractual right or property interest in the office. He accepts it with the understanding that it may be abolished at any time, and the tenure of the office is not protected by constitutional provisions which prohibit impairment of the obligation of contract. Clauses in a Constitution respecting the holding of offices in general by incumbents during their terms do not as a rule prevent the abolition of an office. Tenure of office and civil service statutes do not prevent a bona fide abolition of office."

See annotations 4 A. L. R. 224; 37 A. L. R. 819; 46 C. J., Officers, Section 30, page 935.

In the case of State ex inf. v. Evans, 166 Mo. 347, 66 S.W. 355, the court considered the question of the effect of an order of the county court made pursuant to Section 9079, R. S. Mo. 1899, separating the offices of circuit clerk and recorder of deeds, upon the right of the duly elected person holding both such offices to continue to do so until the expiration of the term for which he had been elected. In the course of its opinion the court stated, 1.c. 356 (166 Mo.):

"The county of Crawford having a population of over ten thousand inhabitants on the sixth of November, 1901, and the county court having on that day made its order separating the offices of circuit clerk and recorder of deeds, and that order having been duly certified to the Governor and the Governor having appointed Thomas M. Wright recorder of deeds within and for said county until his successor shall be elected and qualified, it is obvious that the only question presented by the pleadings in this case is whether the respondent, the circuit clerk of said county, has such a vested right in and to the emoluments of the office of recorder of deeds for said county by virtue of his election as circuit clerk and ex officio recorder of deeds of said county, on November 8, 1898, that the order of the county court separating said offices and the appointment of the Governor can not affect his title thereto.

"It may be well to note that the statutory provisions found in sections 9079 and 9080, Revised Statutes 1899, were in force long prior to the election of respondent to the office of circuit clerk and ex officio recorder in November, 1898. A person in the possession of a public office created by the Legislature has no such vested interest or private property therein that it can not be modified or repealed by the Legislature which created it. Such offices are not held by grant or contract, but are subject to such modifications and changes as the legislative branch of the government may deem it necessary or advisable to enact, unless inhibited by the Constitution. This is the law of this State, and generally in the United States. (Atty.-Gen'l v. Davis, ' 44 Mo. 1.c. 131.)

"As said by the Supreme Court of the United States in Butler et al. v. Pennsylvania, 10 Howard l.c. 416: 'The selection of officers, who are nothing more than agents

for the effectuating of such public purposes, is a matter of public convenience or necessity, and so, too, are the periods for the appointments of such agents; but neither the one nor the other of these arrangements can constitute any obligation to continue such agents, or to reappoint them, after the measures which brought them into being shall have been found useless, shall have been fulfilled, or shall have been abrogated as even detrimental to the well-being of the public . . . It follows, then, upon principle, that in every perfect or competent government, there must exist a general power to enact and to repeal laws; and to create, and change or discontinue, the agents designated for the execution of those laws.'

* * * * * * * * *

"It necessarily follows that as Evans, the respondent, held an office created by the Legislature by virtue of being circuit clerk, the Legislature had the power in its wisdom either to abolish the office or to separate it from the office of circuit clerk and provide for its occupancy either by election or appointment, without infringing any vested right which he had therein."

Holding to the same effect is the case of Gregory v. Kansas City. 244 Mo. 523, 149 S. W. 466.

We feel that the principles above referred to apply in the situation which you have presented. The constitutional provision authorizing an increase in the number of magistrates at the same time authorizes a decrease. No limitation is placed upon the time of the exercise of such authority. Any person who accepts the position of additional magistrate must do so subject to the power of the circuit court, upon proper petition and notice, to abolish the office.

Of course, if the right to abolish exists and is exercised, the right to compensation would also cease inasmuch as it is an incident to the title to the office, and when the office no longer

exists there is no further right to compensation. 46 C. J., Officers, Section 234, page 1016.

Conclusion.

Therefore, it is the opinion of this department that the office of additional magistrate created in accordance with Section 18 of Article V of the Constitution, 1945, may be abolished, as provided by said section, without regard to the term of the incumbent in said office. We are further of the opinion that, upon the abolition of the office, the right to compensation no longer exists.

Respectfully submitted,

ROBERT R. WELBORN Assistant Attorney General

APPROVED:

J. E. TAYLOR Attorney General

RRW:ml

TAXATION:

Fruit tree spray and garden spray sold to owners of commercial orchards and truck gardens are "sales at retail" within subparagraph (g) of Section 11407, Laws of Missouri, 1947, Vol. 1, p. 536. Such sprays not within exemption clause contained in Section 11409, Laws of Missouri, 1945, p. 1869, which clause refers to "seed, limestone or fertilizer".

March 7, 1949.

3/10

#58

FILED

Mr. G. H. Bates, Director Department of Revenue State of Missouri Jefferson City, Missouri

> Attention: Division of Collection, Sales Tax Unit.

Dear Sir:

This department is in receipt of the recent request of Mr. Smith N. Growe, Jr., Acting Assistant Supervisor, Sales Tax Unit, for an official opinion, which request reads as follows:

"May I have an official opinion of your office on the question of whether or not sales tax should be collected by the seller of fruit tree spray and vegetable garden spray to the owners of commercial orchards and commercial truck gardens? The spray referred to is a liquid which is used to prevent the onset of disease to the plant or to the fruit.

Section 1, page 1865, Laws of 1945, provides that seed, limestone or fertilizer which is to be used for seeding, liming or fertilizing crops, which when harvested will be sold at retail or will be fed to livestock or poultry to be sold ultimately in processed form at retail, or will be converted into foodstuffs which are to be sold ultimately in processed form at retail, are exempt from the Sales Tax Act.

Without restricting the question above stated, may we have your opinion as to whether the liquid spray referred to herein may be considered to be in the same classification as seed, limestone or fertilizer."

Mr. G. H. Bates, Director - 2 - Att: Division of Collection Sales Tax Unit

If the "moray" under consideration is furnished to owners of commercial orchards and truck gardens by a "sale at retail" as that term is defined in subparagraph (g) of Section 11407, Laws of Missouri, 1947, Vol. 1, p. 536, such sale becomes subject to taxation as provided in the Sales Tax Act of Missouri, unless specifically exempted from such tax by exemption clauses to be found in the Sales Tax Act at Section 11409, Laws of Missouri 1945, p. 1869. This statement involves two propositions which will be disposed of in the order in which they have been stated.

For a definition of "sale at retail" we quote that portion of subparagraph (g) of Section 11407, Laws of Missouri, 1947, Vol. 1, p. 536, defining the term, as follows:

"" " " (g) 'Sale at retail' means any transfer made by any person engaged in business as defined herein of the ownership of, or title to, tangible personal property to the purchaser, for use or consumption and not for resale in any form as tangible personal property, for a valuable consideration; provided however, that for the purposes of this act and the tax imposed thereby, purchases of tangible personal property made by duly licensed physicians, dentists and veterinarians and used in the practice of their professions shall be deemed to be purchases for use or consumption and not for resale " " "."

The Sales Tax Act does not impose a tax upon all sales of tangible personal property. The tax is imposed only upon sales "for use or consumption and not for resale in any form as tangible personal property." Berry-Kofron Detal Laboratory Co., v. Smith, 345 Mo. 922, 137 S.W. (2nd) 452. As was said in City of St. Louis v. Smith, 342 Mo. 317, 114 S.W. (2nd) 1017, 1.c. 1019.

"It is clear from these statutory provisions that where one buys tangible Mr. G. H. Bates, Director - 3 - Att: Division of Collection Sales Tax Unit

personal property for his own use or consumption he is liable for the tax. On the other hand, it is equally clear that where one buys tangible personal property for the purpose of resale he is not liable for the tax."

In the case of Berry-Kofron Dental Laboratory Co., v. Smith, cited, supra, the Supreme Court of Missouri discussed the words "use" and "consumption" in the following language found in 137 S.W. (2nd) 452, 1.c. 454:

"The words 'use' and 'consumption' are not technical words having a peculiar meaning in law, but words in common use and as employed in the statute must be given their plain, ordinary meaning. Webster's New International Dictionary defines the noun 'use' as 'Act of employing anything, or state of being employed; application; employment, as the use of a pen; his machines are in use'; 'The fact of being used or employed habitually; usage, as, the wear and tear resulting from ordinary use. * * * * * Consumption is defined as 'Act or process of consuming; waste; decay, destruction; also the using up of anything, as food, heat or time: 'Consume' is defined as meaning to destroy the substance of -- to use up, expend, waste -- to eat or drink up (food).

Your inquiry discloses the use to which the fruit tree spray and garden spray is put by the purchasers thereof when it is stated therein that "the spray referred to is a liquid which is used to prevent the onset of disease to the plant or to the fruit." Consequently we have in this instance tangible personal property bought and used, or consumed by the purchaser. Now we must determine whether this spray, after it has been used for the purpose heretofore disclosed, can be said to be

Mr. G. H. Bates, Director - 4 - Att: Division of Collection Sales Tax Unit.

avaliable as tangible personal property for resale in any form.

It is a well established rule of statutory construction that construction of a statute by those charged with the duty of enforcing it, while not binding upon the courts, is entitled to great weight, Automobile Gasoline Co., v. City of St. Louis, 326 Mo. 435, 32 S.W. (2nd) 281; Robertson v. Manufacturing Lumbermen's Underwriters, 346 Mo. 1103, 145 S.W. (2nd) 134.

The Rules and Regulations relating to the Missouri Sales Tax Act, at page 20, provide in part, as follows:

"" " " Sales of goods which, as ingredients or constituents, go into and form a part of tangible personal property for resale by the buyer are not taxable. If tangible personal property is sold and the buyer uses and consumes same in manufacturing or producing another item of tangible personal property, such a sale is made at retail and is taxable."

"An illustration of a sale of tangible personal property which becomes an ingredient or constituent part of a finished product is as follows: 'Tangible personal property such as flour, milk, salt, yeast, sugar and various other constituents, are purchased by a baker who uses the same in the process of baking bread. These items enter directly into and form a part of a loaf of bread and their purchase is made for resale purposes by the baker. The final sale of the bread by him for use or consumption is the taxable sale."

The liquid spray we are considering is without doubt used and consumed by owners of commercial orchards and truck gardens

Mr. G. H. Bates, Director - 5 Att: Division of Collection
Sales Tax Unit

in guarding the produced crop against insects and disease. Its use is a preventative process used to insure a healthy and marketable crop. No suggestion has been made that this spray does, or even could, become an ingredient or constituent part of the crop on which it is sprayed. It seems clear to us that the buyer of this spray, a tangible personal property, has purchased the same for his own use and consumption and has not used the same in such a manner as to classify it as an ingredient or constituent element of any product of orchard or garden. We rule the first proposition in favor of the taxing statute on the definition of "retail sale" as disclosed in subparagraph (g) of Section 11407, cited supra.

Our second proposition stated herein may be disposed of by a construction of that section of the Sales Tax Act covering exemptions and which is designated as Section 11409, Laws of Missouri, 1945, p. 1869. This section is quoted in its entirety as follows:

> "There is hereby specifically exempted from the provisions of this article and from the computation of the tax levied. assessed or payable under this article such retail sales as may be made in commerce between this state and any other state of the United States, or between this state and any foreign country, and any retail sale which the State of Missouri is prohibited from taxing under the Constitution or laws of the United States of America, and such retail sales of tangible personal property which the General Assembly of the State of Missouri is prohibiting from taxing or further taxing by the Constitution of this state. In order to avoid double taxation under the provisions of this article, no tax shall be paid or collected under this article upon the sale at retail of any motor fuel, subject to an excise or sales tax under another law of this state; or upon the sale at retail of fuel to be

Mr. G. H. Bates, Director - 6 -Att: Division of Collection Sales Tax Unit

consumed in manufacturing or creating gas, power, steam, electrical current or in furnishing water to be sold ultimately at retail; or feed for livestock or poultry, which is to be used in the feeding of livestock or poultry to be sold ultimately in processed form or otherwise at retail; or grain to be converted into food stuffs which are to be sold ultimately in processed form at retail; or seed, limestone or fertilizer which is to be used for seeding, liming or fertilizing crops, which when harvested will be sold at retail or will be fed to livestock or poultry to be sold ultimately in processed form at retail, or will be converted into foodstuffs which are to be sold ultimately in processed form at retail." (Underscoring ours)

If the facts of the case at hand are to be brought within any of the exemption clauses of Section 11409, supra, they must fall, if at all, in the exemption clause referred to in your request, and which we have underscored in the above quoted statute. Before proceeding further in this opinion we will outline the rules of statutory construction on which our ultimate conclusion is to be based regarding the exemption clause under consideration.

The Supreme Court of Missouri, in construing one of the exemption clauses contained in Section 11409, supra, in the case of Mississippi River Fuel Corporation v. Smith, 350 Mo., 1,164 S.W. (2nd) 370, 1.c. 377, used the following language:

"That portion of Sec. 11409 in question is a statute exempting from taxation, and will be strictly construed against him who claims to be exempt under it, and no presumption will be indulged in favor of an exemption."

Mr. G. H. Bates, Director - 7 - Att: Division of Collection Sales Tax Unit

The rule to be followed in construing taxing statutes and exemption clauses therein has been well stated in the following language of the Supreme Court of Missouri in the case of American Bridge Co., v. Smith, 352 Mo. 616, 179 S.W. (2nd) 12, 1.c.15:

"The primary rule of construction of statutes is to ascertain the lawmakers' intent, from the words used if possible; and to put upon the language of the Legislature, honestly and faithfully, its plain and rational meaning and to promote its object, and the manifest purpose of the statute, considered historically, is properly given consideration " ". While statutes authorizing a particular tax are to be construed strictly against the taxing authority, a tax exempting statute will be strictly construed against him who claims to be exempt under it."

With the above rules in mind we turn to the exemption clause contained in Section 11409, supra, which exempts from the sales tax "seed, limestone or fertilizer which is to be used for seeding, liming or fertilizing crops, which when harvested will be sold at retail or will be fed to livestock or poultry to be sold ultimately in processed form at retail, or will be converted into foodstuffs which are to be sold ultimately in processed form at retail."

A well known canon of statutory construction, of almost universal application, is that the expression of one thing is the exclusion of another. Facts in the instant case do not warrant us in deviating from this rule in determining the question at hand. Unless we can classify "fruit tree spray" and "vegetable garden spray" as terms germane to the words "seed, limestone or fertilizer" appearing in the exemption clause, it necessarily follows that such sprays are not exempted from the tax and it will be unnecessary to discuss the ultimate disposition to be made of crops and fruits treated with such spray.

Mr. G. H. Bates, Director - 8 - Att: Division of Collection Sales Tax Unit

"Seed" as a noun, is defined as the fertilized and matured ovule of the higher or flowering plants (57 C.J. p. 94).
"Limestone" is a rock, more or less crystalline or crystalline granular in condition, and consisting chiefly of calcium carbonate and yielding lime when burned (53 C.J.S., p. 886). The word "fertilizer" is a mere synonym for "manure" (Words and Phrases, Vol. 16, p. 489). No disclosed facts covering the content, use or purpose of the liquid spray under consideration bring it, in our opinion, within the statute's descriptive words of "seed, limestone or fertilizer", which words have a common and well understood meaning. Having reached this conclusion, it is not necessary to extend this opinion on the question of disposition to be made of crops within the additional terms used in the exemption clause of the statute.

CONCLUSION.

It is the opinion of this department that sales of "fruit tree spray" and "vegetable garden spray" sold to owners of commercial orchards and commercial truck gardens are "sales at retail" as that term is defined in subparagraph (g) of Section 11407, Laws of Missouri, 1947, Vol. 1, p. 536. It is also the opinion of this department that such "fruit tree spray" and "vegetable garden spray" are not within the exemption clause contained in Section 11409, Laws of Missouri, 1945, p. 1869, which specifically exempts from the provisions of the Sales Tax Act "seed, limestone or fertilizer" used under the conditions stated in such exemption clause.

Respectfully submitted,

JUDIAN L. O'MALLEY Assistant Attorney General

APPROVED:

J. E. TAYLOR Attorney General MOTOR VEHICLES:

Procedure outlined in House Bill No: 258, Laws of 1947, Vol. II, page 431, for collection of sales tax on motor vehicles not to be applied to trailers and semi-trailers.

May 4, 1949

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FILED 5

Mr. G. H. Bates Director, Dept. of Revenue State of Missouri Jefferson City, Missouri

Dear Sir:

This is in reply to your recent request for an opinion from this department, such request reading as follows:

"Since the passage of H.B. 258 by the 64th General Assembly, our Department has been inclined to rule that the sale of trailers while subject to the Missouri Sales Tax, did not come under the provisions of said H.B. 258 because it was not a motor propelled vehicle.

"I now find that there is a difference of opinion even in our own Department and would, therefore, appreciate it if you will advise me if the sales and use tax on trailers should be collected as prescribed in said H.B. 258, the same as on motor vehicles."

In order to determine the question presented by your inquiry a review must be made of House Bill No. 258, Laws of Missouri, 1947, Vol. II, page 431. At the very outset we recognize the fact that House Bill No. 258, supra, amended the Missouri Sales Tax Act (Article 24, Chapter 74, Mo. R.S.A.) by repealing five sections of the Sales Tax Act and enacting five new sections in lieu thereof, and by so doing transferred the collection of sales tax on motor vehicles from vendors thereof to the Director of Revenue. Procedures were provided for the collection of the tax and such tax was denominated a use tax as applied to owners and operators of motor vehicles.

Prior to the enactment of House Bill No. 258, supra, purchasers of all motor vehicles, including trailers, paid the tax imposed by the Sales Tax Act as purchasers of tangible personal property subject to the tax. In amending the Sales Tax Act by enactment of House Bill No. 258, supra, motor vehicles were lifted out of the general category of tangible personal property at which the Sales Tax Act is directed and were given special classification as objects of the tax levied under the Sales Tax Act.

A close reading of House Bill No. 258, supra, convinces us that a main purpose of this special classification of motor vehicles was to enable the Legislature to devise a more feasible plan which would insure the prompt, orderly and certain collection of the tax imposed. The procedures outlined in House Bill No. 258, supra, for the payment and collection of the tax on motor vehicles, lends support to our contention in this respect.

We now take up the terms "trailer" and "semi-trailer" as those terms may be related to the term "motor vehicles" as the same is used in House Bill No. 258, supra, and consider whether they should be included or excluded under the procedures set up in the new amendment to the Sales Tax Act. It is admitted that the terms "trailer" and "semi-trailer" are not mentioned in the Sales Tax Act, and if they are to be brought within its scope it can only be done by disclosing their meaning to be synonymous with the term "motor vehicles," as used in the amended Sales Tax Act.

At the time House Bill No. 258, supra, was enacted the Legislature could not help but be fully cognizant of the well accepted meaning of the term "motor vehicle," the uses to which such a vehicle is put in private and commercial usage, the general provisions of Missouri's Motor Vehicle Code and the special definitions there set out of the terms "motor vehicle" and "trailer," and the special requirements contained in the Motor Vehicle Code providing separate fees and licenses for motor vehicles and trailers. The failure of the Legislature to include the terms "trailer" and "semi-trailer" in House Bill No. 258, supra, does not allow us to conclude that such failure was due to inadvertence on the part of the lawmakers. Accepted rules of statutory construction will not allow us to implement the act of the Legislature when no ambiguity exists in the wording of the law.

Only two cases in our Missouri courts have been found where the term "trailer" was held to be within the phrase "motor vehicle," and in such instances such "trailers" were held to be related to the term "motor vehicle" only when functioning as a part and parcel of the motor vehicle which furnished the moving power. See State v. Harper, 184 S.W. (2d) 601, 353 Mo. 821; State v. Schwartzmann Service, 40 S.W. (2d) 479, 225 Mo. App. 577.

Section 8367, Mo. R.S.A., contains the following definition of "motor vehicle":

"Any self-propelled vehicle not operated exclusively upon tracks, except farm tractors."

In the same section we find the following definition of "trailer":

"Any vehicle without motive power designed for carrying property or passengers on its own structure and for being drawn by a self-propelled vehicle, except those running exclusively on tracks, including a semitrailer or vehicle of the trailer type so designed and used in conjunction with a self-propelled vehicle that a considerable part of its own weight rests upon and is carried by the towing vehicle."

We rely on the definitions of "motor vehicle" and "trailer," just quoted from the Motor Vehicle Act of Missouri, and conclude that the terms are not synonymous.

Conclusion.

It is the opinion of this department that the procedure set forth in House Bill No. 258, Laws of Missouri, 1947, Vol. II, page 431, for the collection and payment of the use tax on motor vehicles, as provided therein, will not apply when said tax is levied against trailers and semi-trailers.

Respectfully submitted,

APPROVED:

JULIAN L. O'MALLEY Assistant Attorney General

J. E. TAYLOR Attorney General DUPLICATED OFFICES:

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The same person may not at the same time be public administrator in a third class county and also be city attorney for a village within that county because of the incompatibility between the two offices.

May 6, 1949

Honorable William Barton Missouri House of Representative Captiol Building Jefferson City, Missouri



Dear Sir:

This office is in receipt of your recent letter in which you request an official opinion upon the following question:

"May a Public Administrator in third class county serve as city attorney in Village without forfeiting his county office as Public Administrator?"

In answer to this question we would first call your attention to Article VII, Section 8 of the new Constitution, which sets forth the general qualifications for public office. That section states:

"No person shall be elected or appointed to any civil or military office in this state who is not a citizen of the United States, and who shall not have resided in this state one year next preceding his election or appointment, except that the residence in this state shall not be necessary in cases of appointment to administrative positions requiring technical or specialized skill or knowledge."

From the above it will be observed that there is no general disqualification of one person holding more than one office. There are, however, disqualifications in certain instances, as is indicated in Section 9 of Article VII of the new Constitution. This section states:

"No person holding an office of profit under the United States shall hold any office of profit in this state, members of the organized militia or of the reserve corps excepted."

A further disqualification is set forth in Article III, Section 12 of the new Constitution, this section states:

"No person holding any lucrative office or employment under the United States, this state or any municipality thereof shall hold the office of senator or representative. any senator or representative accepts any office or employment under the United States, this state or any municipality thereof, his office shall thereby be vacated and he shall thereafter perform no duty and receive no salary as senator or representative. During the term for which he was elected nor senator or representative shall accept any appointive office or employment under this state which is created or the emoluments of which are increased during such term. This section shall not apply to members of the organized militia, of the reserve corps and of school boards, and notaries public."

The old (1875) Constitution had a restriction set forth in Article VI, Section 18 which section states that no person could hold two offices in cities or counties having more than two hundred thousand inhabitants. This section, of course, would never have been applicable to your situation, and in the new Constitution it was omitted altogether.

It will thus be seen that there is no specific statutory prohibition against the same individual holding the offices of public administrator of a county and city attorney of a village within that county. However, there is a further test that must be applied to these situations even where there is no statutory prohibition. That test is whether the duties of the offices held by one individual are incompatible with each other. A very clear statement regarding this matter is made by the court in the case of State ex rel. v. Bus, 135 Mo. 325. Here the court said, 1.c. 338, 339:

"The remaining inquiry is whether the duties of the office of deputy sheriff and those of school director are so inconsistent and incompatible as to render it improper that respondent should hold both at the same time. At common law the only limit to the number of offices one person might hold was that they should be compatible and consistent. The incompatibility does not consist in a physical

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inability of one person to discharge the duties of the two offices, but there must be some inconsistency in the functions of the two; some conflict in the duties required of the officers, as where one has some supervision of the other, is required to deal with, control, or assist him.

"It was said by Judge Folger in People ex rel. v. Green, 58 N.Y. loc. cit. 304: 'Where one office is not subordinate to the other, not the relations of the one to the other such as are inconsistent and repugnant, there is not that incompatibility from which the law declares that the acceptance of the one is the vacation of the other. The force of the word, in its application to this matter is, that from the nature and relations to each other, of the two places, they ought not to be held by the same person, from the contrariety and antagonism which would result in the attempt by one person to faithfully and impartially discharge the duties of one, toward the incumbent of the other. Thus, a man may not be landlord and tenant of the same premises. He may be landlord of one farm and tenant of another, though he may not at the same hour be able to do the duty of each relation. The offices must subordinate, one the other, and they must, per se, have the right to interfere, one with the other, before they are incompatible at common law."

In the specific case which you present to us we must therefore look at the duties of the office of public administrator of a county and those of city attorney of a village in that county, and try to determine whether situations could or would be apt to arise in which it would be difficult or impossible for the same person to fully and impartially exercise the duties of these two offices at the same time. It is the opinion of this department that such situations could arise where the same person simultaneously held the office of public administrator of a county and the office of city attorney of a village within that county.

As one illustration of such a situation let us assume that a person dies in a county where the same individual is both public administrator for the county and city attorney for a village within that county. Let us assume further that the deceased person dies testate; that under his will he left property to the village of which the public administrator is city attorney; that

under his will he names an executor who himself dies before administration can be started upon the estate of the testator. In such a situation, assuming that the deceased testator had no other relative living, the public administrator would take charge of the administration of his estate. As city attorney of the village to which a bequest had been made under the will of the deceased it would be his duty to try to get for the village the property bequeathed it. As public administrator it would be his duty to contest this bequest if there was ambiguity in the will, or any other question present regarding the validity of the will, or if there was any question whether the village had the power to take such a bequest. In this situation, obviously, there would be a conflict of duty between the city attorney and the public administrator and it would be impossible for the same individual holding both offices to do his full duty by the village and by the county.

Let us assume another fact situation in respect to this matter of incompatibility. Let us assume that a person dies intestate with no heirs. The village of which the public administrator is city attorney has a tax claim against personal property of the deceased. As city attorney it would be his duty to try to collect these taxes. But if there was any question regarding the validity of the assessment upon which this village tax claim was founded, or any question whether a part or all of these taxes had already been paid, or any other one of numerous questions which might arise in this respect, as public administrator it would be his duty to resist payment of these taxes to the village. Here, as in the above, it seems plain that under this assumed condition of facts it would be impossible for one person holding at the same time the office of public administrator of a county and the office of city attorney of the village within that county to fully discharge the duties of both offices.

Numerous other similar illustrations showing the incompatibility between these two offices could be given, but we believe that the two cited above are sufficient to illustrate this point.

CONCLUSION

It is the conclusion of this department that the same person may not at the same time be public administrator in a third class county and also be city attorney for a village within that county because of the incompatibility between the two offices.

APPROVED:

Respectfully submitted,

J. E. TAYLOR Attorney General HUGH P. WILLIAMSON Assistant Attorney General TAXATION) Invalidity of automobile use tax does not affect remainder SALES TAX) of act relative to collection of sales tax on motor vehicles.

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December 21, 1949

Honorable G. H. Bates Director of Revenue Jefferson City, Missouri



Dear Sir:

We have received your request for an opinion of this department, which request is as follows:

"In the case of THE STATE OF MISSOURI, at the relation of TRANSPORT MANUFACT-URING AND EQUIPMENT COMPANY, a corporation, vs. G. H. BATES, et al., No. 41456, the Supreme Court of Missouri handed down its opinion on November 14, 1949, in which it specifically held that the use tax on motor vehicles imposed by Laws of Missouri, 1947, Volume 2, pages 431 to 436 was unconstitutional.

"We are now confronted with the question as to what extent this decision affects the sales tax imposed by the same law and particularly in the following respect.

"The Sales Tax Act, Laws of Missouri, 1945, pages 1865 to 1881, inclusive, would require the auto dealer to collect the sales tax from the purchaser at the time sale was made and remit same to the Department of Revenue.

"The 1947 law involved in this case would require the purchaser of an automobile to pay the sales tax to the Department of Revenue before securing Certificate of Title. Therefore, our question is this, should we now collect the sales tax on automobiles under the 1947 law, or revert to the 1945 law and require the dealer to collect and remit sales tax on automobiles?"

The act cited in your letter, and which included the use tax, consisted of a total of five sections. Only one of the sections related to the use tax. Sub-paragraphs (c) and (d) of section 11412 imposed such tax. The other provisions of the act related to collection of the sales tax, previously imposed, upon motor vehicles. The general scheme of these provisions was to transfer the collection of sales tax upon sales of automobiles from the dealer to the Director of Revenue. Instead of requiring that the dealer collect the tax at the time of sale, provision was made for the payment of such tax by the purchaser to the Director of Revenue at the time that the certificate of title to the automobile was obtained. Payment of the tax was made a condition precedent to the issuance of the certificate, unless the transaction involved was exempt from sales tax. Section 11412 (a) and (b) made such provision, and the remaining sections of the bill, except those imposing the use tax, made various changes in the sales tax act, required by the change in the method of collecting the tax on such transactions.

"A statute may * * * be in part constitutional and in part unconstitutional, and if the parts are wholly independent of each other, that which is constitutional may stand while that which is unconstitutional will be rejected, and this rule applies, even though the constitutional and unconstitutional parts are in the same section of the act; but if the parts are inseparably connected with each other, the entire statute will be held void." 59 C.J., Statutes, sec. 205, p. 639.

The rule was stated by the Missouri Supreme Court in the case of State ex rel. Harvey v. Wright, 251 Mo. 325, 1. c. 337, 158 S.W. 823, as follows:

"We might state it in the following language, by saying that, if after cutting out and throwing away the bad parts of a statute, enough remains, which is good, to clearly show the legislative intent, to furnish sufficient details of a working plan by which that intention may be made effectual, then we ought not as a matter of law to declare the whole statute bad."

We feel that, insofar as the act in question is concerned, the provisions of the act relating to the change in the method of collection of the sales tax upon motor vehicles are independent and separable from those relating to the use tax. Certainly enough remains to show the legislative intention in such regard and to furnish sufficient details by which that intention may be made effectual.

Honorable G. H. Bates

The basis of the decision of the court did not involve in any manner the validity of the provisions of the act relative to the sales tax. The use tax was declared invalid because of the exemption therefrom of motor vehicles having a seating capacity of ten or more passengers, the court holding that such exemption rendered the tax not uniform. No such exemption is found in the sales tax on motor vehicles.

No reference was made in the case before the Supreme Court to the validity of the provisions of the act relating to the sales tax. The court, in its opinion handed down on November 14, 1949, employed language which might have been taken to mean that the entire act was invalid. However, the opinion was modified on December 12, 1949, and restricted to declare invalid only that portion of the act levying the use tax. The last paragraph of the opinion, as modified, reads in part as follows:

"* * * The invalid exemption renders that portion of this Act levying the use tax herein considered invalid since the imposition of such tax, without the exemption, would be other than that which the General Assembly intended and enacted. We cannot free the use tax levied from the unconstitutional taint of the condemned exemption. The portion of the Act levying the use tax must fall with the invalid exemption. For these reasons the use tax levied in the Act is violative of Section 3 of Article X of the Constitution."

CONCLUSION

Therefore, this department is of the opinion that the decision of the Supreme Court in the case of State ex rel. Transport Manufacturing and Equipment Co. v. Bates et al., in which the use tax imposed by laws of Missouri, 1947, Vol. II, p. 431, was held unconstitutional, did not affect the portions of said act which provided a new method of collecting sales tax upon sales of motor vehicles, and that the method of collecting such tax should continue to be that provided in said 1947 act.

Respectfully submitted,

APPROVED:

ROBERT R. WELBORN Assistant Attorney General

J. E. TAYLOR Attorney General/

RRW/feh

COUNTIES:

The County Court may lease the poor farm under COUNTY COURT: certain circumstances.

November 22, 1949

Honorable Ralph R. Bloodworth Prosecuting Attorney Butler County Poplar Bluff, Missouri

Dear Mr. Bloodworth:

This is in reply to your request for an opinion which we re-state as follows:

> Butler County owns about seventy acres of land with a large house and barn on it which is being used as a county poor farm. It has about nineteen inmates now. The County Court proposes to lease this seventy acres of land from year to year to one of several applicants for the sum of one dol-The lessee is to provide food, clothing and care for all inmates admitted to the farm at his own expense and is to stock the farm and furnish the necessary farm implements used thereon and is to carry on said farm at his own expense. Under these conditions is it legal for the County Court to enter into a lease of the county poor farm?

It would seem that the County Court is about to enter into an agreement whereby the support and keeping of the poor is let out by contract under the implied authority contained in Section 9607, R.S. Mo. 1939, which reads as follows:

> "Sec. 9607. Not applicable to certain counties. -- The four preceding sections shall not apply to any county where the support and keeping of the poor is let out by contract, nor to any county where the superintendent rents or leases the poor farm and stocks the same and furnishes the necessary farm implements used

thereon at his own expense, and carries on said farm at his own expense."

In an opinion under date of September 12, 1945, (Peal) this office rendered an opinion in which Section 9607 was set out and following thereafter is the language:

"Under the provisions of Section 9607, supra, it appears that the county courts may, in their discretion, contract for the support and keeping of the poor with private individuals. * * * ."

In an opinion under date of April 10, 1943, (Douglas) this office considered the question of the authority of a County Court to rent office space in the County Courthouse. In the course of that opinion may be found the following reasoning:

"Your second question is whether or not a county court has the authority to rent office space in the county courthouse to a private individual or to those other than county officers.

"The county courts in the State of Missouri have the power of control and management of county property by virtue of the provisions of Section 2480, R.S. Mo. 1939. This section has the following provisions:

"'The said court shall have control and management of the property, real and personal, belonging to the county, and shall have power and authority to purchase, lease or receive by donation any property, real or personal, for the use and benefit of the county; to sell and cause to be conveyed any real estate, goods or chattels belonging to the county, appropriating the proceeds of such sale to the use of the same, and to audit and settle all demands against the county.'

"From the above provisions it can readily be seen that the county courts in the various

counties shall have the control and management of all of the property belonging to the county. There seem to be two rules relative to the renting of county property to private individuals, neither of which has been adopted by the statutes or decisions of the State of Missouri. In view of the fact that county boards or county courts have no powers other than those conferred by statute, such boards have no power or authority to rent or lease property of the county unless specifically authorized to do so by the statutes of the State. The other rule has been that the former rule is limited only to county property used or useful for county purposes. See 20 C.J.S., Section 170, page 1002.

"We do not feel that the county court should be given the right to lease property belonging to the county for an indefinite period of time when there is a possibility that such property may in the future be useful or required by the county for some function of the county government. However, we do not feel that this rule should apply in the matter of renting space in the courthouse from month to month, when such space is not needed by the county. If the space is rented from month to month it can be readily recovered by the county, but if it is leased for a period of years it would be difficult, if not impossible, for the county to obtain possession of such office space."

The general rule concerning the powers of County Courts is set out in 20 C.J.S., page 850, as follows:

"It is well settled that a county board possessed and can exercise such powers, and such powers only, as are expressly conferred on it by the constitution or statutes of the state, or such powers as arise by necessary implication from

those expressly granted or such as are requisite to the performance of the duties which are imposed on it by law. It must necessarily possess an authority commensurate with its public trusts and duties."

The rule concerning the power of the County Court to lease county property may be found in 20 C.J.S. at page 1002, which is as follows:

"In accordance with the general rule, stated in Sec. 82, that county boards or county courts have no powers other than those conferred, such courts or boards have no power to rent or to lease property or franchises owned by the county, unless they are expressly or impliedly authorized to do so, as where they are given control of county property; but the application of this rule has been, by one authority, limited to county property used or useful for county purposes, and the public use of a building must not be interfered with by the lease of a part thereof.

* * * "

The Court of Appeals of Ohio, Scioto County, considered the question of the leasing of county property in the case of Minamax Gas Co. vs. State, 170 N.E. 33. In its opinion the Court reviewed the authorities as follows, 1.c. 35:

"The claim of the prosecuting attorney in this action is that the lease is wholly void, either because there is no statutory power in the commissioners to lease county property, or because, if there is such power, it proceeds from section 2447, General Code, and that the conditions imposed by that section were not complied with.

"Counties have generally been held to be agencies of the state for the performance of functions of the state, and, while necessarily clothed with some corporate powers, to have only such powers as are conferred by statute. Board of Commissioners v. Gates, 83 Ohio St. 19, 93 N.E. 255. In other jurisdictions

counties have no power to alien property unless express legislative authority exists therefor. See note in Ann. Cas. 1913E, 528. In Ohio, however, there was early recognition of the fact that, while counties have no power to acquire property not needed for county purposes, the county might find itself actually possessed of property for which there was no public need. In such case, said the Supreme Court in Reynolds v. Commissioners of Stark County, 5 Ohio 204, if the property is not held in trust, and not dedicated to public use, it may be aliened, because the right to alien follows necessarily as an incident to ownership. Later the General Assembly enacted what is now section 2447 et seq., General Code, prescribing the method by which county commissioners may sell real estate which is not needed for county purposes.

-5-

"It is claimed in this case, that, as a lease is in law a sale of an interest in real estate (Brenner v. Spiegle, 116 Ohio St. 631, 157 N.E. 491), a valid lease may be made by the commissioners only by complying with the terms of the statute referred to, and, as the terms of that statute require competitive bids after due advertisement the lease in question is invalid because it was effected without such competition or advertisement. Other counties have found it convenient and profitable to temporarily lease property for which there was no immediate need, and we hesitate to unequivocably condemn a practice that properly carried out results in even a slight public advantage. Moreover, it appears a forced interpretation to say that the General Assembly, in regulating the sale of county real estate for which the county has no use, intended to inhabit the leasing of property which the county could not sell. This appears to us not only a strained construction, but one not necessary to fully protect the public interests. Until the commissioners find that county real estate is 'not needed for public use' all such property must be deemed or some potential use to the county, So long as it has such potential use, the

interests of the county do not require its sale, nor does section 2447 permit its sale. In the absence of a finding that would enable the commissioners to sell, title must be retained by the county, but, under the doctrine of the Reynolds Case, supra, there is no reason why it should not be temporarily leased, subject to repossession whenever the public needs so require. The commissioners could not however, lease for a definite term and thereby embarrass either themselves or their successors in using the property for public purposes."

If a county provides for the support and keeping of the poor by contract, there may be no present need to which a county poor farm may be put. Following the reasoning set out above, we do not see any objection to the County Court leasing the poor farm in such circumstances when the lease is for a year to year period. However, in all such situations it must be kept in mind that the County Court must fulfill its obligation to see that poor persons are supported.

We have your recent letter enclosing a copy of a lease which has been prepared by the Division of Welfare. This lease has been used in several counties in this State and the form is acceptable to the Federal officials. We have suggested a revision of the provision concerning termination of the lease which would result in more protection to the County Court, should circumstances dictate a return of the farm to county supervision.

CONCLUSION

Therefore, it is the opinion of this department taht where the support and keeping of the poor is let out by contract, the County Court may enter into a lease of the Kentucky poor farm."

Respectfully submitted,

JOHN R. BATY Assistant Attorney General

APPROVED:

J. E. TAYLOR Attorney General OFFI not and D

es of County Collector and County Assessor e and one person may serve as County Assessor ty Collector at the same time.

FILE.

January 4th, 1949.

1-11-49

Hon. Paul Boone, Prosecuting Attorney, Ozark County, Gainesville, Missouri.

Dear Sir:

This will acknowledge receipt of your letter of December 9th, 1948, in which you request an opinion of this department. Your letter, omitting caption and signature, is as follows;

"I desire your opinion as to whether or not a County Assessor may also hold the position of Deputy Collector or Clerk in the Collector's office, when the duties require him to actually collect taxes, issue receipts, make out apportionments and otherwise attend to the office of Collector."

Under the provisions of the Constitution of Missouri, adopted in 1945, there are only two clauses therein which relate to the holding of two offices by the same person. One of these is Section 9 of Article 7 of the Constitution which provides as follows:

"No person holding an office of profit under the United States shall hold any office of profit in this State, members of the organized militia or of the reserve corps excepted."

It is, of course, readily apparent that the above constitutional provision would not apply to two persons holding two county offices.

The other constitutional provision referring to the question of one person holding more than one office is Section 12, Article 3 of the Constitution of Missouri, 1945, and pertains only to the members of the State Legislature. Under this provision, a member thereof will forfeit his office therein if he accepts any lucrative office or employment under the United States, State of Missouri or any municipality thereof. However,

as in the case of the other constitutional provision set out herein, this provision will not affect the instant question.

We have searched the statutes of the State of Missouri but we fail to find any statutory provisions which will aid us in the solution of your problem. Therefore, we must turn to the decisions of the courts of this State in order to find an answer to the question. The settled rule of the common law seems to be that one person can not hold two incompatible offices at the same time. In the case of State ex rel McAllister vs Dunn, 209 S.W. 110, 277 Mo. 38, the Supreme Court of Missouri said:

"It is elementary law that one can not hold two offices, the duties of which are incompatible."

Also see State ex rel Gragg vs Barrett et al, 180 S.W. (2), (Mo. Sup). In the McAllister case, supra, a deputy collector was also serving as Treasurer of the County and it was held that the two offices were incompatible. However, it does not seem that the courts of this State have ever passed on the incompatibility of the two specific offices mentioned in your opinion request. Consequently, we must examine briefly the duties of each office in order to arrive at a conclusion.

A County Assessor is charged with the duty of assessing all the property, both real and personal, in the County for the purpose of determining the amount of taxes due. He also must sit on the Board of Equalization and the Board of Appeals both of which review the assessment of property made by the Assessor. However, the Assessor has no duties to perform respecting the collection of taxes nor has he any other duties which would be incompatible with the office of County Collector.

The County Collector is charged with the collection of all county taxes after they have been assessed by the Assessor and passed on by the Board of Equalization and Board of Appeals. He has no discretionary powers along this line and must collect the amount of taxes on the books as delivered to him by the County Clerk. Therefore, we find that he has no duties which would be incompatible with those of the County Assessor. Consequently this department concludes that one individual can hold the office of County Assessor and also serve as Deputy County Collector.

CONCLUSION.

It is therefore the opinion of this department that the offices of County Assessor and County Collector are not in compatible and thus one person can act both as County Assessor

and also serve as Deputy County Collector.

Respectfully Submitted,

Assistant Attorney General.

APPROVED:

J.E. TAYLOR, Attorney General.

JSP/pw

CORONERS: Fees in connection with coroner's SHERIFFS: inquests.

June 10, 1949

Hon. Ted A. Bollinger Prosecuting Attorney Shelby County Shelbyville, Missouri



Dear Sir:

We have received your request for an opinion of this department, which request is as follows:

"1. Does a coroner receive compensation for mileage under Laws of 1945, p. 992, Section 1a, or under Section 13424, R.S. Mo. 1939, which apparently has not been repealed? The former provides for 5 cents per mile while the latter provides for 8 cents.

"2. Section 13411, R.S. Mo. 1939, provides for mileage for a sheriff when serving subpoenas, etc., when more than five miles from the place court is held. Does this section apply to coroner's inquests and if so, does the place where the inquest is held become the determining point for computing mileage?

"3. Are a sheriff and his deputy entitled to retain witness fees and mileage taxed as costs in a coroner's inquest?"

Section 13424, R. S. Mo. 1939, provides, in part, as follows:

"Coroners shall be allowed fees for their services as follows: Provided: that when persons come to their death at the same time or by the same casualty, fees shall only be paid as for one examination:

** * * * * * * * *

"The above fees, together with the fees allowed jurors, constables and witnesses, in all inquests, shall be paid out of the county treasury as other demands. For performing the duties of sheriff, the coroners shall be entitled to the same fees as are for the time being allowed to sheriffs for the same services."

Section 1(a) of an act of the 63rd General Assembly, found in Laws of 1945, page 992, Section 13259.5, Mo. R.S.A., provides:

"The county court shall allow the coroner, payable at the end of each month
out of the county treasury, five cents
per mile for each mile actually and
necessarily travelled in the performance
of his official duties."

This act applies to counties of the third class, the class to which Shelby County belongs.

Section 1 of the act fixes the salaries of coroners in counties of the third class, ranging from \$120.00 to \$600.00 per annum.

Section 2 of the act, Section 13259.6, Mo. R.S.A., provides:

"It shall be the duty of the coroner in counties of the third class to charge and collect in all instances every fee accruing to his office by law; except such fees as are chargeable to the county and such coroner shall, at the end of each month, file with the county court a report of all fees charged and collected during said month, stating on what account said fees were charged and collected, together with the names of persons paying or who are liable for the same, which report shall be verified by

the affidavit of said coroner. It shall be the duty of said coroner, upon the filing of such report, to forthwith pay over to the county treasury all fees required to be shown in said monthly report, taking a duplicate receipt therefor, one of which shall be filed in his office and one in the office of the clerk of the circuit court, and every such coroner shall be liable on his official bond for all such fees collected and not accounted for by him and paid by him to the county treasury." (Underscoring ours.)

Prior to the adoption of this act, coroners were compensated entirely by fees. The 1945 act was enacted in accordance with the general plan, following the adoption of the 1945 Constitution, of placing county officers on a salary rather than a fee basis.

As the emphasized words in Section 2 of the act, supra, provide, the coroner is now required to collect all fees accruing to his office, except such as are chargeable to the county. All of the fees provided by Section 13424, supra, are chargeable to the county. Therefore, we feel that the act of 1945 has repealed, by implication, Section 13424, R.S. Mo. 1939, and that section is no longer in effect. Consequently, the coroner would now receive mileage at the rate of five cents per mile in accordance with Section 1(a) of the act of 1945, supra.

As for your second question, Section 13411, R. S. Mo. 1939, provides, in part:

"Fees of sheriffs shall be allowed for their services as follows:

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* * * * * * * * * * * * *

12.34949

This section clearly refers to proceedings of court.

Although cases have described a coroner's inquest as a quasi
judicial proceeding (Patrick v. Employers Mutual Liability Ins.
Co., 233 Mo. App. 251, 118 S.W. (2d) 116), it has never been
termed a court. A coroner is not a judicial officer (State v.
Dougherty, 216 S.W. (2d) 467).

The general rule is that an officer is entitled to fees only when there is a clear statutory provision therefor (Nodaway County v. Kidder, 344 Mo. 795, 129 S.W. (2d) 857). Applying that rule to the section referred to by you, we are of the opinion that the sheriff is not entitled to receive any fees there-under for services in connection with a coroner's inquest.

As for your third question, Section 13 of Article VI of the Constitution of 1945 provides:

"All state and county officers, except constables and justices of the peace, charged with the investigation, arrest, prosecution, custody, care, feeding, commitment, or transportation of persons accused of or convicted of a criminal offense shall be compensated for their official services only by salaries, and any fees and charges collected by any such officers in such cases shall be paid into the general revenue fund entitled to receive the same, as provided by law. Any fees earned by any such officers in civil matters may be retained by them as provided by law."

Although a coroner's inquest has been held not to be a part of a criminal prosecution (State v. Bartley, 337 Mo. 229, 84 S.W. (2d) 637), it has been held to be "one step taken in the enforcement of the criminal laws of the land." (Houts v. McCluney, 102 Mo. 13, 1.c. 17, 14 S.W. 766.) See 18 C.J.S., Coroners, Section 14, page 293. In view of such definition of the character of a coroner's inquest, we are of the opinion that a sheriff and his deputy are not, under the constitutional provision quoted above, entitled to retain witness fees and mileage taxed as costs in a coroner's inquest.

Conclusion.

Therefore, it is the opinion of this department that:

- 1. A coroner receives compensation for mileage under Section 1(a), Laws of 1945, page 992, and not under Section 13424, R. S. Mo. 1939.
- 2. A sheriff is not entitled to mileage under Section 13411, R. S. Mo. 1939, which provides for mileage for sheriffs when serving subpoenas, etc., when more than five miles from the place court is held.
- 3. A sheriff and his deputy are not entitled to retain witness fees and mileage taxed as costs in a coroner's inquest.

Respectfully submitted,

ROBERT R. WELBORN Assistant Attorney General

APPROVED:

J. E. TAYLOR Attorney General

RRW:ml

LIQUOR SEARCH AND SEIZURE

CRIMINAL LAW

Disposition of proceeds of sale of contraband liquor after payment of fine and costs assessed by the court.

June 24, 1949

Hon. Joseph M. Bone Prosecuting Attorney Audrain County Mexico, Missouri FILED 10

Dear Sir:

This will acknowledge receipt of your request for an opinion which reads:

"January 15, 1949, Edward Lee Bugg and C. M. Irvine were arrested in this county for violation of Sec. 4900 (G) R.S. Mo. 1939, in connection with this arrest a search warrant was issued for the business premises operated by them under the provisions of Sec. 4916, and the following contraband liquor was conficated under said search warrant, 31 3/4 cases of beer and 1070 bottles of whiskey and assorted liquors.

"Sections 4916 and 4917 R.S. Mo. for 1939 in part provide a method for disposing of the proceeds from the sale of contraband. However, this act appears very incomplete and does not provide for disposition to be made of the proceeds from the sale of contraband over and above that part applied in payment of any fine and cost. Section 4917 provides for turning over the proceeds of sale of contraband, connected with the production and manufacture of liquor, to the school fund, but does not cover the disposition to be made in case of illegal or unlawful sale of contraband liquor.

"I would like to have the opinion of your department construing these sections relative to the factual statements above."

As we gather from your inquiry, what you are anxious to know is where you shall place the proceeds from the sale of said contraband liquor after the payment of fine and costs assessed by the court.

Certainly any intoxicating liquor being unlawfully kept, sold or otherwise disposed of is declared to be contraband and no person has any property right whatsoever in or to said liquor. Also the court is duly authorized to order sale of such contraband and the proceeds of such sale shall be applied against the payment of fines and costs assessed against the person so convicted. Section 4916, Mo. R.S.A., reads in part:

" * * All intoxicating liquor unlawfully manufactured, stored, kept, sold, transported or otherwise disposed of, and the containers thereof and all equipment used or fit for use in the manufacture or production of the same, including all grain or other materials used, in the unlawful manufacture of intoxicating liquor, and which are found at or about any still or outfit for the unlawful making or manufacture of intoxicating liquor, are hereby declared contraband, and no right of property shall be or exist in any person or persons, firm, or corporation owning, furnishing or possessing any such property, liquor, material or equipment; but all such intoxicating liquors, property, articles and things, shall be sold upon an order of the court and in the manner hereinafter provided and the proceeds thereof shall be applied on the payment of any fine and costs lawfully assessed against any person or persons convicted of the unlawful manufacture, production, transportation, sale, gift, storing, or possession of intoxicating liquor, # # #"

As shown hereinabove such contraband liquor shall be sold upon an order of the court in the manner hereinafter provided. Section 4916, supra, does not provide what disposition shall be made of any remaining money from the sale of contraband liquor over and above the payment of fine and costs.

As heretofore stated, the only real question involved here is where shall the proceeds be placed. Shall they be paid into the county treasury for the benefit of the school fund as provided in Section 4917, Mo. R.S.A., or in some other manner.

Section 4917, supra, requires the officer seizing and holding any of the property hereinabove mentioned, which applies to Section 4916, supra, which provision includes intoxicating liquor as in this instance, to make application to the court upon final determining of said prosecution, for an order to sell same. The statute requires the court to order a sale if the court is satisfied, that such property seized and held, was at the time of seizure being kept or used or was fit for use in the unlawful manufacture or production of intoxicating liquor. While certainly the Legislature must have intended this Section to apply to all such conditions as stated in your request, same is rather ambiguous. It would appear at first blush from the language used in Section 4917, supra, that it does not apply to intoxicating liquor having the proper revenue stamps of the state and federal government affixed thereon, which is not illegal per se, since said intoxicating liquor was not kept, used, or fit for use in the unlawful manufacture or production of intoxicating liquor. However, since there is no other statute dealing specifically with the disposition of fines and penalties derived from the sale of such intoxicating liquor, which has been declared to be contraband under Section 4916, supra, we are inclined to believe that it was the intent of the Legislature to make Section 4917, supra, likewise apply to such intoxicating liquor. This conclusion is supported by the title to said act which under rules of statutory construction may be considered when a statute is ambiguous. The title to said Liquor Control Act when passed by the 58th General Assembly. page 269, Laws of Mo. 1935, reads in part:

> "* * * providing for searches and seizures and for the disposition, sale or destruction of intoxicating liquor, manufactured, sold or possessed illegally; * * *"

Under any circumstances the person convicted in this case cannot contend that he is entitled to such proceeds for the reason that the law clearly states in Section 4916, supra, that no person can have any property right in or to said intoxicating liquor. We are inclined to believe that this ambiguity is more or less cured by the passage of Senate Bill #110 by the 65th General Assembly of the State of Missouri, which bill was approved by the Governor on May 24 and since it carried an emergency clause, the bill became effective upon approval by the Governor.

Senate Bill #110, supra, repealed Section 4916, Mo. R.S.A. and enacted in lieu a new section known as 4917 and 4917a, which sections clearly require the proceeds of such sale to be paid into the general revenue fund of the State of Missouri, on page 6 which reads:

" * * Or, if the property is valued at more than the established lien and all costs of proceedings and sale, an order shall be made for the sale of said property by the seizing officer or by the Supervisor of Liquor Control, if the seizure was made by him or one of his agents, at public or private sale, subject to the approval of the court, and out of the proceeds of such sale shall be paid (1) storage, if any (2) the lien, (3) the cost of the proceedings, and (4) the residue, if any, shall be paid into the General Revenue Fund of the State of Missouri. If it shall be determined that no person, other than the defendant, has any interest in said property or that the person or persons having any interest in said property knew of or connived or gave consent, express or implied, to the illegal use thereof, and if it shall be found by the court that said property was, at the time it was seized, being illegally used and was contraband, as declared by any section of the Liquor Control Law of the State of Missouri, the said property shall be declared to be forfeited to the State of Missouri, and the court shall order the officer who seized said property or the Supervisor of Liquor Control, if the property was seized by one of his agents, to sell said property at public or private sale, subject to the approval of the court, and out of the proceeds of said sale shall be paid (1) the cost of storage, if any, (2) cost of the proceedings of the case and (3) the balance thereof shall be paid into the General Revenue Fund of the State of Missouri. * * *"

While there is a constitutional inhibition against Ex Post facto laws and laws impairing the obligation of contracts or retrospective operation and the making of irrevocable grants of such immunities, (See Sec. 13, Art. I, Constitution of Mo. 1945) it is well established that procedural statutes should be given a liberal construction rather than technical, in an effort to determine the cause of its merits and such procedural statutes may act retroactively. (See Sec. 700, C. J. Vol. 59; Gerber v. Schutte Investment Co., 194 S.W. (2d), 354 Mo. 426)

In view of the fact no person has any property right in and to said intoxicating liquor declared to be contraband, no vested rights are impaired and Section 4917, supra, relative to

disposition of proceeds of any such sale is more or less procedural, that disposition of such proceeds should go into the General Revenue Fund of the State of Missouri. However, it is well established that the General Assembly cannot circumvent any provision of the Constitution of the State of Missouri and any part of any act that is in conflict therewith, is invalid. In view of Section 7, Art. IX, Constitution of Missouri, 1945, which reads:

"All real estate, loans and investments now belonging to the various county and township school funds, except those invested as hereinafter provided, shall be liquidated without extension of time, and the proceeds thereof and the money on hand now belonging to said school funds of the several counties and the city of St. Louis, shall be reinvested in registered bonds of the United States, or in bonds of the state or in approved bonds of any city or school district thereof, or in bonds or other securities the payment of which are fully guaranteed by the United States, and sacredly preserved as a county school fund. Any county or the city of St. Louis by a majority vote of the qualified electors voting thereon may elect to distribute annually to its schools the proceeds of the liquidated school fund, at the time and in the manner prescribed by law. All interest accruing from investment of the county school fund, the clear proceeds of all penalties, forfeitures and fines collected hereafter for any breach of the penal laws of the State, the net proceeds from the sale of estrays, and all other moneys coming into said funds shall be distributed annually to the schools of the several counties according to law."

Which section is clearly self-enforcing and requires no enabling act of the General Assembly for the placing of the proceeds of such sale of intoxicating liquor into such funds and which provision requires such proceeds to be placed into the county school fund, we are of the opinion that that part only of Section 4917 which provides that the proceeds of such fine or penalty shall be placed in the General Revenue of the State conflicts with the provisions of Art. IX, Sec. 7, Constitution of Mo. 1945, and therefore that part of Section 4917, Senate Bill No. 110 must be considered invalid and that the part of Section 7, Art. IX, supra, dealing with the custody of such proceeds shall apply in this instance.

Certainly under Sections 4916 and 4917, supra, the payment of any fine and costs assessed by the court against a defendant, shall take priority over any other demand against the proceeds from the sale of contraband liquor. It is after the payment of fine and costs that the "clear proceeds" from the sale shall be placed into the county school fund as provided in Section 7, Art. IX, Constitution of Mo. 1945.

The term "clear proceeds" as used in Section 7, Art. IX, Constitution of Mo. 1945, has been defined heretofore by the courts as follows. In State ex rel. v. Warner, 197 Mo. 650, 1.c. 660-661, the Supreme Court of this state defined "clear proceeds" in the following manner:

"State ex rel. Clay County v. Railroad, 89 Mo. 562, was an action under a statute providing for a penalty for not ringing a bell or sounding a whistle at a certain public crossing. That statute gave onehalf the penalty to the informer and the other half went to the county, and the same statute has been brought forward in later revisions as live law. (See R.S. 1899, sec. 1102.) A defense was interposed that the penalty under the Constitution belonged to the school fund, and, hence, the statute was void. It will be instructive to read that case in connection with the point now under consideration in the case at bar. Because, it will be observed, the Constitution refers to the 'clear proceeds' of fine and penalties, and the learned judge who wrote that opinion construed 'clear proceeds' to mean, as applied to that case, the onehalf given by the statute to the county. It will not be space misapplied, nor labor lost, to quote from that case, thus:

"'It is only the "clear proceeds of the penalties" collected in the several counties for breaches of the penal laws of the State that belong (with the other funds specified) to the several counties under this constitutional provision. The Legislature, in imposing penalties for violation of its laws, may, in its discretion, for the purpose of securing the enforcement of said laws, the collection of the penalties imposed, and

paying the expenses thereof, give a part thereof to an informer, and in such case what is thus realized constitutes the "clear proceeds of said penalties," within the meaning of section 8, article 11, of the Constitution, supra. (Barnett v. Railroad, 68 Mo. 56.) It follows, therefore, that section 806 is not unconstitutional, as claimed by defendant."

Also in State v. DeLano, 49 S.W. 808-809, 80 Wis. 259, 1.c. 260-261, the court held the "clear proceeds" as used in a similar provision to mean the amount left of such fines after making authorized deductions. In that case the deductions authorized were for an informer. In so holding the court said:

"Winslow, J. The defendant claims that ch. 351, Laws of 1891, is unconstitutional and void, because - First, it contravenes that part of sec. 2, art. X, of the constitution of Wisconsin, which provides that the clear proceeds of all fines collected in the several counties for any breach of the penal laws . . . shall be set apart as a separate fund, to be called the "school fund." Second, it contravenes sec. 6, of art. I, of the constitution, which provides against the infliction of excessive fines and cruel and unusual punishments.

"* * * Really the question simply is, What is the meaning of the words 'clear proceeds,' as used in the constitution? That it does not mean 'entire' proceeds is, we think, too clear for argument. 'Clear' implies that something is to be or may be deducted, so that the balance is 'clear' from all charges or demands. It seems to us that the word 'clear' is here used in the sense that it is frequently used colloquially when we speak of the 'clear profit' in a business transaction, meaning the 'net profit' after all expenses or losses are deducted. Obviously, if this is the meaning of the word in this connection, it was contemplated that there would be power resting somewhere to provide for and define what deductions from the gross fine could properly be made. If that power exists, and we hold that it does, it must rest in the legislature, as said by

Mr. Justice Lyon in State ex rel. Guenther v. Miles, 52 Wis. 488.

"This view of the intent of the framers of the constitution in using the words 'clear proceeds' is strengthened when we consider that the system of paying a moiety of fines in many penal actions to informers was in frequent use in England from very early times, and has been quite generally adopted in this country. Bac. Abr. tit. 'Actions Qui Tam;' 3 Bl. Comm. 160.

"It is not unreasonable to suppose that the words 'clear proceeds' were intended to provide for just this contingency, so that the legislature might authorize a part to be paid to the informer for the purpose of securing a better enforcement of the law. It is quite evident that, if it is not made an object for some one to prosecute, many salutary laws would never be enforced, because no one would be interested in seeing them enforced."

Therefore, under Section 4916, supra, no one can question the fact that the proceeds from the sale of such contraband liquor shall be applied against the payment of fine and costs assessed by the court and the *clear proceeds,* which means balance of the amount of money received from the sale of contraband liquor after the payment of fine and costs assessed against a defendant, shall go into the county school fund as provided in Section 7, Art. IX, Constitution of Mo. 1945.

CONCLUSION

Therefore it is the opinion of this department that while Section 4917, Senate Bill No. 110, passed by the 55th General Assembly requires any residue from sale of contraband liquor, after payment of fine and costs assessed by the court, shall be placed in the General Revenue Fund of the State of Missouri, only such provision with respect to placing said residue from sale of said intoxicating liquor in the General Revenue Fund of the State, infringes the provisions of Section 7, Art. IX, Constitution of Mo. 1945, and therefore any fine and costs assessed against any defendant must first be paid out of the proceeds from the sale of any contraband liquor as provided in Section 4916, supra, and

thereafter the "clear proceeds," which means the residue of amount received from sale of such contraband liquor after payment of fine and costs assessed, shall be placed in the county school fund to conform with the provision of Sec. 7, Art. IX, Constitution of Mo. 1945.

Respectfully submitted,

AUBREY R. HAMMETT, JR. Assistant Attorney General

APPROVED:

J. E. TAYLOR ATTORNEY GENERAL

ARH:nm

CRIMINAL LAW: Services included in term "valuable thing" used in Section 4694, R. S. Mo. 1939.

October 24, 1949

Honorable Ted A. Bollinger Prosecuting Attorney Shelby County Shelbyville, Missouri FILED 10 19/25/49

Dear Sir:

This is in reply to your recent request for an opinion which reads as follows:

"An opinion is requested of your office to determine whether a prosecution can be instituted under Section 4694, R. S. Mo. 1939, where a bogus check is given in payment for services rendered the check writer. The question being whether services come within the terms of the statute reading 'valuable thing'."

In disposing of your inquiry, we are called upon to construe Section 4694, R. S. Mo. 1939, which provides:

"Every person who, with the intent to cheat and defraud, shall obtain or attempt to obtain, from any other person, or persons, any money, property or valuable thing whatever by means or by use of, any trick or deception, or false and fraudulent representation, or statement or pretense, or by any other means or instrument or device, commonly called 'the confidence game,' or by means, or by use, of any false or bogus check, or by means of a check drawn, with intent to cheat and defraud, on a bank in which the drawer of the check knows he has no funds, or by means, or by use, of any corporation stock or bonds, or by any other written or printed or engraved instrument, or spurious coin or metal, shall be deemed guilty of a felony, and upon conviction thereof be punished by imprisonment in the state penitentiary for a term not exceeding seven years."

Our search covering the decisions of the Missouri courts does not reflect a case which rules this question. However, the statute above is not unlike that which was construed by the Supreme Court of Mississippi in the case of State vs. Ball, 75 So. 373, 374, 114 Miss. 505, L.R.A. 1917E, 1046. The Mississippi statute read in part as follows:

"Every person who, with intent to cheat and defraud, shall designedly, by color of any false token or writing, or by any other false pretense, obtain the signature of any person to any written instrument, or obtain from any person any money, personal property, or valuable thing, upon conviction there, * * * * ."

The Supreme Court of Mississippi held that the exact question raised in the above cited case was whether or not the professional services of a physician was a "valuable thing." In ruling the point, the Court spoke as follows:

" * * * We think the object of the statute is primarily to reach the mischief of fraud or deceit practiced by one person upon another in obtaining something of value by such deceit or false pretense. The thing obtained by the deceit or false pretense must be either money, personal pro-perty, or valuable thing. In the case before us the thing obtained by the false pretense and deceit was the services of a physician of the value or worth of \$15. The term 'valuable thing' is very broad and comprehensive, and the Legislature, no doubt, intended it as an enlargement, and not a restriction, to tangible personal property. The services of a competent physician is undoubtedly a valuable thing within the meaning of the statute. The services of the wage hand in the field or the employe in the factory or the professional services of the lawyer or doctor are valuable. The amount or value is either fixed or easily ascertainable. Therefore the services of the physician in this case is a 'valuable thing,' and when obtained by false pretenses and deceit the statute has been violated, and the guilty person is liable to prosecution thereunder. As

the goods, wares, and merchandise of the storekeeper are his stock in trade, so are the services of the doctor, lawyer, or mechanic their stock in trade, and the one should not be deprived of his property by false pretenses any more than the other, as the mischief intended to be cured is the obtaining of the 'valuable thing' by one person from another by means of deceit and false representations * * * ."

We consider the reasoning set forth in the case of State vs. Ball, supra, as particularly applicable to the question being determined, and adopt the same in support of the conclusion made herein.

CONCLUSION

It is the opinion of this department that "services" are to be considered within the term "valuable thing" as such term is used in Section 4694, R. S. Mo. 1939.

Respectfully submitted,

JULIAN L. O'MALLEY Assistant Attorney General

APPROVED:

J. E. TAYLOR Attorney General

JLO'M: VLM

TAXATION: Errors on the tax book for current or previous years taxes may not be corrected by Collector.

November 9, 1949

Mr. Ted A. Bollinger Prosecuting Attorney Shelby County Shelbyville, Missouri



Dear Mr. Bollinger:

This is to acknowledge receipt of your letter requesting a legal opinion of this department, and which reads as follows:

"An opinion is requested from your office for a ruling on the following state of facts:

"Lots one and two, Block three, Shelbyville, Missouri have been owned for many years by one Alice Christine. Lot three, Block three, has been owned by one Omar Smoot. The County Collector's tax records show the ownership to be that Christine owns two and three and Smoot, one. This has existed for some twentynine years, to date. Smoot sold his lot (#3) in 1948 with the taxes not paid for 1947 to J. M. Forman; Christine sells Lot one to Matticks the deed reciting that all taxes are paid. The 1947 taxes are charged on the collectors books against Lot one giving Christine credit for having paid up to date on #3. Smoot refuses to pay the 1947 taxes on the ground that he never owned the land listed to him on the collector's books because the lot actually owned by him shows all taxes paid. Christine refuses to pay on the ground that she will not stand a double charge.

"The issue, therefore, is whether the collector can correct his tax books back to the date of the original error and properly charge Smoot with the unpaid taxes."

If the erroneous assessment appearing on the tax book is to be corrected by the collector it must be done by authority of some specific section of the statutes or of some appellate court decision upholding the legality of such procedure. Mr. Bollinger Shelbyville, Mo.

After diligent search we are unable to find any statutory provision by which the collector may correct the tax book in the manner indicated in your letter, and we therefore, turn to the decisions of the courts on this state to ascertain whether or not the collector has this power.

We believe that the case of State ex rel. vs. Brown, 172 Mo., is in point and is applicable to the facts before us in 1. c. 381, the court said:

"* * *The facts as disclosed in this case show that the county clerk extended the taxes to the respective school districts; whether his action was in pursuance of the provisions of the statute, whether legal or illegal, the collector was not answerable for the acts of the clerk. After the tax books were adjusted and turned over to the collector, he had but one duty to perform; that was to collect the taxes and apply them as indicated by the tax The collector has no power over the tax books, he is not authorized by any statute that has been brought to the attention of this court. to alter or change the tax books at pleasure. He is responsible for the taxes as they appear upon his books, and if they are changed in any manner, except in pursuance of the statute, however just the change might be, it would afford him no protection."

In this case the plaintiff sought to force the collector to accept as payment in full a less rate of taxes than his book showed to be due, and prayed the court to issue a writ of mandamus compelling the collector to accept the payment of taxes as tendered, and that he be required to let his record show the payment of the taxes in full. The trial court refused to grant the writ, and in discussing the court's failure to do so, the Supreme Court further said:

"* * *To issue the writ in this case would be compelling the collector to do something not only not provided by the statute, but to do an act which the law prohibits him from doing--the altering and changing of the tax books. The action of the trial court was right and will not be disturbed by this court."

Each tract or lot of land shall be assessed in the manner provided by Section 22, page 1789, Laws of Missouri, for 1945. Errors appearing on the tax book do not effect the validity of the assessment.

Said section reads as follows:

"Each tract of land or lot shall be chargeable with its own taxes, no matter who is the owner, nor in whose name it is or was assessed. The assessment of land or lots in numerical order, or by plats and a 'land list' in alphabetical order, as provided in this chapter, shall be deemed and taken in all courts and places to impart notice to the owner or owners thereof, whoever or whatever they may be that it is assessed and liable to be sold for taxes, interest and costs chargeable thereon; and no error or omission in regard to the name of any person, with reference to any tract of land or lot, shall in anywise impair the validity of the assessment thereof for taxes."

It was immaterial that the tax book showed the land here in question was assessed to the wrong person, as the assessment was valid and it was the collector's duty to collect the taxes shown to be due on the record.

In passing upon the collector's duty in the collection of taxes, the court said, in the case of Mathews vs. The City of Kansas, 80 Mo. 1. c. 236.

"* * *The assessment was made on the land itself by its numbers regardless of who was its
owner. It was not the duty of the collector
to look up the owner or apply to him for the
taxes. The tax by law became due and payable
at certain prescribed periods, and it was the
duty of the owner to go to the collector, or
send some one and pay this tax assessed on the
land as such. So the collector in his testimony but stated a legal truth in saying that
he had no concern as to who was the owner of
a given lot or tract of land. He was receiving
the tax imposed on the given lot as such. * *"

In view of the foregoing statute and court decision, it appears that the collector does not have the legal authority to correct errors appearing on the tax book, no matter how just or proper the corrections might be. It further appears that such errors do not effect the validity of the assessment, since the assessment of the real estate tax is against each tract or lot of land, and not the

owner. The collector has but one duty, and that is to collect the taxes due on each peice of property as shown by his tax book.

It, therefore, follows that the collector of Shelby County may not correct the tax book to show Lot 3, assessed to Smoot for the current or any previous years' taxes. He is also without power to make the further correction showing Lots 1 and 2 assessed to Christine and her payment of the taxes on these lots, for the current or any previous years' taxes. The inability of the collector to make the correction may result in hardship to Christine, although such an occurrence may be unavoidable.

It appears that the unfortunate situation in which Christine now finds herself is due largely to her lack of proper care in the payment of taxes. At any time before the taxes have been paid, upon her proper application and proof to the County Court, Christine might have been successful in getting the County Court to order the County Clerk to make the corrections on the tax book according to her request. Such a procedure is authorized by Sections 24 and 25, pages 1789 and 1790, Laws of Missouri for 1945, but the taxes have been paid and this remedy is not now available to her.

The taxes paid by Christine were paid voluntarily and without any compulsion being exerted over her. At no time previous to the payment did she make inquiry as to what lands were assessed to her on the tax book, and it does not appear that she has made any attempt to ascertain whether the lands assessed to her were Lots 1 and 2, which she owned and desired to pay taxes on. It appears that the erroneous assessment on the tax book had been continued for the past 29-years, and that at no time during that period had she ever made any attempt to have the error rectified.

It has long been the law in Missouri that one who voluntarily pays taxes, while laboring under a mistake of fact at the time of payment, may not recover the amount paid to the collector.

In passing upon this matter the court said in the case of Mathews v. Kansas City, supra, 1. c. 240:

"* * *The mistake of the tax-payer himself ought not to imperil this fund. Such property is our growing communities is constantly changing ownership. The collector's books are the sources of information, not only to the public dealing with the property, but to municipal authorities themselves charged with the duty of the prompt collection of the revenues.

A party who, like this plaintiff, lies by for four years after making the mistake before he demands a rectification, should at least come with clearest equity and pursuasive proof."

This same general rule of law was also upheld in the cases of Inhabitants of Schell City vs. Rumsey Mfg. Co., 39 Mo. App. 264, and Walker vs. The City of St. Louis, 15 Mo. 376.

In view of the foregoing cases, Christine may not recover the voluntary payment of taxes from the collector of Shelby County, as her unhappy situation is a result of her own negligence and mistake of fact, and the collector has in no way contributed to that situation.

CONCLUSION

It is therefore, the opinion of this department that a county collector does not have the power to correct errors appearing upon the tax book whether for the current or any previous year's taxes. That it is the duty of the collector to collect all taxes charged against each tract or lot of land on said record, and without regard to whether or not such entries are correct or incorrect.

Respectfully submitted,

PAUL N. CHITWOOD Assistant Attorney General

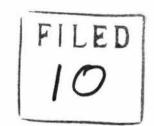
APPROVED:

J. E. TAYLOR Attorney General HEDGE FENCES: PROSECUTING ATTORNEYS: (1) Sec. 8578, R.S. Mo. 1939, is not violated merely by permitting a hedge to shade a road.
(2) It is discretionary with the prosecuting attorney as to whether he shall institute action upon receipt of complaint by a private citizen regarding a hedge fence which allegedly violates this section.

November 23, 1949

Honorable Ted A. Bollinger Prosecuting Attorney Shelby County Shelbyville, Missouri

Dear Mr. Bollinger:



We have your recent letter in which you request an opinion of this office. Your letter is as follows:

"In connection with opinion No. 25-49 rendered recently to Ralph H. Duggins, Prosecuting Attorney, I would like an opinion of your office in regard to whether or not a private citizen may complain of a hedge fence which adjoins a public roadway, on the ground that such hedge shades the road and prohibits drying.

"Is it then the duty of the Prosecuting Attorney to commence an action upon such complaint or should the complaint be made duly by the county officers set out in the statute?"

The opinion referred to construed a portion of Section 8578, R. S. Mo. 1939, and held that said portion was within the police power of the state and that the phrase "along or near" was not so indefinite or uncertain as to render the statute unenforceable for indefiniteness or uncertainty of application. Section 8578 is as follows:

"Every person owning a hedge fence situated along or near the right of way of any public road shall between the first days of May and August of each year cut the same down to a height of not more than five feet, and any owner of such fence failing to comply with this section shall forfeit and pay to the capital school fund of the county wherein

such fence is situated not less than fifty nor more than five hundred dollars, to be recovered in a civil action in the name of the county upon the relation of the prosecuting attorney, and any judgment of forfeiture obtained shall be a lien upon the real estate of the owner of such fence upon which same is situated, and a special execution shall issue against said real estate and no exemption shall be allowed. Any prosecuting attorney who shall fail or refuse to institute suit as herein provided within thirty days after being notified by any road overseer, county or state high-way engineer, that any hedge fence has not been cut down to the height herein required within the time required, shall be removed from office by the governor and some other person appointed to fill the vacancy thus The cutting of any such fence after the time herein required shall not be a defense to the action herein provided for."

Your first question then is whether it is the duty of the prosecuting attorney to commence an action upon the complaint of a private citizen, on the ground that a hedge fence shades the road and prevents drying. There is no violation on the grounds of shading alone, for no where in this penal statute is shading mentioned.

As to commencing an action upon a private complaint, it is always the duty of the prosecuting attorney to initiate action where he believes the law is being violated. State ex inf. McKittrick v. Wallach, 182 S.W. (2d) 313, 353 Mo. 312, wherein the court said:

"In determining whether to institute prosecution in a particular case, prosecuting attorney must exercise in good faith the sound discretion conferred by law upon him as a prosecuting officer to act officially in such circumstances and upon each separate case according to the dictates of his own judgment and conscience uncontrolled by judgment or conscience of any other person."

Thus, if you, as prosecuting attorney, have called to your attention a hedge fence, the owner of which in your opinion is

violating Section 8578, supra, then regardless of the source of your information it would be your duty to institute proceedings against said owner. On the other hand, if it is your opinion that the hedge growth in question does not bring its owner under the provisions of Section 8578, supra, the complaint of a private citizen would not require you to institute proceedings. State v. Wallach, supra.

It will be observed that the statute in question is in two parts, that is, a period separates that portion establishing the hedge owner's duty and setting the penalty to be applied to individuals who violate its provisions from that portion which provides a penalty to be imposed upon the prosecuting attorney under certain conditions, i.e., his failure to act after being notified of a violation of said section by certain designated officials. We must then further analyze the section to ascertain if the Legislature intended that it should be treated as two sections, separated by a period but united for convenience because of a certain similarity of subject matter. In Illinois Bell Telephone Co. v. Ames, 364 Ill. 362, the court announced this rule:

"Punctuation is to be considered and given weight in construction of statute unless from inspection of whole act it is apparent that it must be disregarded to arrive at the Legislature's intention."

Although no cases dealing with the exact effect of a period in a statute have been found, a case holding that "in a statute semicolons have effect of separating with more distinctness than commas" (Town of West Hartford v. Faulkner Co., 10 Atl. (2d) 592) would indicate, a fortiori, the pronounced effect of a period.

The wording of the section is, of course, of prime significance in determining the intent of the Legislature. Section 8578, supra, provides that "any owner * * failing to comply * * shall forfeit and pay * * in the name of the county upon the relation of the prosecuting attorney * * *," thus setting out the duty, a penalty for violation, and naming the prosecuting attorney as the enforcing officer. It is important that there is no provision that notice of such violation shall be brought to the attention of the prosecutor by any particular person.

The second portion following the period provides: "Any prosecuting attorney who shall fail or refuse to institute suit * * * after being notified by any road overseer, county or state highway engineer * * * shall be removed from office by the governor * * *." Thus, the statute announces separate duties,

distinct penalties, and two different enforcing authorities. As was said in Cairo Bridge Commission v. Mitchell, 352 Mo. 1136:

"Statutes are to be construed, if possible, so as to harmonize and give effect to all their provisions, which requires that in determining the meaning of a particular section of an act all other parts should be considered."

The case of Hanover Importing Society v. Gagne, 92 F. (2d) 888, demonstrates the significance to be attached to one penalty for the public at large (hedge owners) and another separate one for prosecuting attorneys:

"Where a statute defines separate classes on which benefits are to be conferred or burdens imposed, provisions relating to any single class will ordinarily be regarded as applying to such class alone * *"

Thus, where separate penalties are provided, one for the hedge owners and another for the prosecuting attorney, the elements constituting a violation are to be treated as separate also, that is, the provision for notice by certain officials, which could make the prosecutor liable, has no relation to the liability of various offending hedge owners. Construction of this statute calls forth an application of the doctrine "expressio unius est exclusio alterius," for certainly by specifically requiring notice by certain officials before the prosecutor is to become liable the statute excludes the idea that the same notice shall be given before the hedge owners could be considered as violating the section. "The expression of one thing is the exclusion of another in the construction of statutes." Crevisour v. Hendrix, 234 Mo. App. 1012.

To sum up then, Section 8578, supra, provides a penalty to be imposed only upon hedge fence owners who fail to comply with certain specific provisions regarding the height of the fence at a certain time of the year. Said section also provides those violating these aforesaid specific provisions. Up to this point this statute is like the great majority of penal statutes which create a duty, set out a penalty for violation thereof, and provide for enforcement by certain officials. What distinguishes this statute from the usual one of its kind is that it then goes on to further provide a penalty for the prosecuting attorney if he fails or refuses to bring an action should certain named

officials call his attention to a violation of the duty created in the first portion of the statute. But, for all the various reasons heretofore set out, it clearly appears that the portion relating to the penalty to be applied to prosecuting attorneys is not necessary to, is separate from, and does not alter, the meaning of the first portion of the statute relating to the owners of hedge fences.

CONCLUSION

It is the opinion of this office that:

- 1. Section 8578, R. S. Mo. 1939, is not violated merely because a hedge fence shades a road, thus preventing drying, but before there is a violation the hedge must in fact exceed the maximum height set out in the statute during certain months as prescribed in said statute;
- 2. The initiation of an action under Section 8578, R. S. Mo. 1939, upon the complaint of a private citizen is discretionary with the prosecuting attorney;
- 3. This office does not, however, in so holding, pass upon the validity of that portion of the statute relating to the institution of action upon the complaint of certain officials designated therein and the removal of the prosecuting attorney for refusal or failure to do act.

Respectfully submitted,

H. JACKSON DANIEL Assistant Attorney General

APPROVED:

J. E. TAYLOR Attorney General RECORDER) Duty of Recorder of Deeds to record marriage certificates. MARRIAGE)

November 29, 1949

Honorable Joseph M. Bone Prosecuting Attorney Audrain County Mexico, Missouri



Dear Sir:

We have received your request for an opinion of this Department, which request is as follows:

"A marriage license was issued by the Recorder of Audrain County, Missouri on July 25, 1949. The Certificate of the Minister accompanying the return of this license to the Recorder of Audrain County, Missouri shows that on the face of the Certificate that the ceremony was performed on the 3rd day of September, 1949.

"The question raised by the Recorder of this County is whether or not he is authorized to record the same in view of Section 34 of the "Uniform Vital Statistics Act" appearing in Volume 1 of the Laws of Missouri for 1947 at Page 246, which requires every person who performs a marriage ceremony to return and file said certificate with the Recorder of Deeds in the County of issue within ten days after such ceremony of marriage has been performed.

"At the bottom of the Marriage Certificate appears the following printed statement:

"'If not used, this certificate shall be void after Ten (10) days from the date of issuance.'

"Section 34 of the Laws for 1947, Page 246, Volume II is in apparent conflict with Sections 3367 and 3368, Revised Statutes of Missouri for 1939 in that these sections provide that said certificate shall be returned within ninety days from the date of issue of said license; and no where does the Statutes provide that in any event that the license shall be void. The Recorder of this County has raised the following questions on the above stated facts:

"1.-That whether the return of the officiating Minister or officer on the face of the certificate shows that said marriage was performed at a period of time greater than the Ten days provided in Section 34, Laws 1947, Page 246, Volume 1, whether the Recorder is legally authorized to record said Certificate?

"2.-Whether or not the ten days provided for in Section 34 Supra, is in conflict with the provisions of Sections 3367 and 3368 of the Revised Statutes of the State of Missouri for 1939?

"3.-Whether under either provisions, if the license is not used within the required time whether said license is void?

"Another situation arised relative to marriage license in this County wherein a license is issued by the Recorder of this County and the marriage is performed outside of the State; to wit: in the State of Illinois and said certificate is returned. If such license is valid under the Laws of Missouri, what is the Recorder's duty relative to recording the returned certificate?"

We enclose herewith copies of two opinions of this Department bearing upon your questions. The one dated August 2, 1946, and addressed to Mr. Alfred Moeller, Prosecuting Attorney of Ste. Genevieve County, concludes that a marriage is not rendered void by reason of the fact that the marriage ceremony is performed more than ten days after the date of the issuance of the license therefor. That opinion deals with Section 3364-a, Laws of 1943, page 641, which provides that a marriage license shall be void after ten days from the date of issuance.

The second opinion is dated May 15, 1944, and is addressed to Mrs. Ruby Koelling, Recorder of Deeds, City of St. Louis, Missouri. That opinion deals with the duty of the recorder in respect to recording marriage certificates which show on their face that the ceremony was performed outside the State of Missouri or more than ten days from the date of issuance of the license. It concludes that in either event it is the duty of the recorder to record the marriage certificate, his duty otherwise in such matters being limited by Section 3367, R. S. Missouri, 1939, to certifying to the Grand Jury the names of persons solemnizing marriages who fail to return the certificate within ninety days after its issuance.

The only additional statutory enactment subsequent to those opinions and possibly affecting them is Section 34 of the Uniform Vital Statistics Act referred to in your letter and found Laws of 1947, Volume II, at page 237, 246. That section provides:

"Every person who performs a marriage ceremony shall prepare and sign a certificate of marriage in duplicate one of which shall be given to the parties and the other filed by him within ten days after the ceremony with the officer who issued the marriage license. Every officer who issues a marriage license shall forward to the state registrar on or before the 15th day of each calendar month a list of the certificates of marriage which were filed with him during the preceding calendar month on forms to be furnished by the state registrar."

Nowhere in that Act is the recorder prohibited from recording a certificate which is not returned to him within the ten day period. Section 38 (3) of the Act imposes a penalty of a fine of not more than \$100.00 upon any person who neglects to perform any duties imposed upon him by the Act. The person who performed the ceremony and omitted to return the certificate within ten days thereafter might be liable to such a penalty, but that does not involve the duties of the recorder. Certainly the status of the parties to the marriage should not be affected by the failure of the person performing the ceremony to return the certificate within the prescribed time.

As to whether or not Section 34 of the Uniform Vital Statistics Act is in conflict with Section 3367, R. S. Missouri, 1939, we think it unnecessary to consider inasmuch as it is our view that the duty

of the recorder is not affected thereby. We might point out that Section 3367 deals with the time following the issuance of the license within which the license must be returned, whereas Section 34 deals with the time following the performance of the ceremony.

CONCLUSION

Therefore, it is the opinion of this Department that it is the duty of a recorder of deeds to record a marriage certificate filed with him without regard to the time which has elapsed since the issuance of the license, or the time which has elapsed since the performance of the ceremony, or the fact that the marriage was performed in another state.

Respectfully submitted,

ROBERT R. WELBORN Assistant Attorney General

APPROVED:

J. E. TAYLOR Attorney General FOREST CROP LANDS:

Forest crop lands shall be assessed at \$1.00 per acre as long as classification continues; duties of assessor, county clerk and collector in assessment, levy and collection of taxes.

March 16, 1949

4.2

FILED //

Honorable Edwin F. Brady Prosecuting Attorney Benton County Warsaw, Missouri

Dear Sir:

Your request for an opinion based upon the following facts has been received:

"Section 6 of the Forests and Forestry Act, Chapter 102A, Revised Statutes of Missouri, provides that forest crop lands shall receive partial relief from taxation. Section 8 provides that while so classified such lands shall be assessed at \$1.00 per acre, Section 11a provides that the collector shall keep all records of all taxes due on said lands so that in the event it is removed from the classification as forest crop land, all the taxes carried against it can be collected. Section 6 also states that no such land shall be classified for tax relief if the value of the land exceeds \$10.00 per acre. Section 10 provides a grant by the state to the counties in lieu of taxes of 2¢ per acre per year on such lands.

"Therefore, on forest crop lands, is it the duty of the county officers involved to collect the regular amount of taxes which would otherwise have been due anyway, if the land was assessed at more than \$10.00 per acre, these taxes to be collected from the owner? On forest crop lands which were previously assessed at \$10.00 or less per acre, should the tax produced on an assessment of \$1.00 per acre be collected currently from the owner?

"The assessor, county clerk and collector of this county are in doubt as to the correct procedure for handling forest crop lands for tax purposes, but from my study of the act it appears that the owner should pay the full amount of taxes on forest crop land that was previously assessed at more than \$10.00 per acre, and that the owner should be required to pay the tax on an assessment of \$1.00 per acre on forest crop land which was previously assessed at \$10.00 per acre. Together the state grant of 2 cents per acre. Your opinion upon these questions will be sincerely appreciated."

Under the present law the Missouri Conservation Commission has been given power to accept and classify forest crop lands and to prescribe the terms, conditions of the tender, acceptance and classification. The details of the application and classification are set out in Section 14431.105. Mo. R.S.A., and reads as follows:

"Any re rson desiring to have lands designated as forest crop lands shall submit an application therefor to the District Forester on form or forms to be provided by the Commission. The District Forester will make or cause to be made an examination of the lands covered by said application and shall forward a copy of same, together with his recommendations, to the Commission. If the Commission approve and classify lands as forest crop lands they shall be subject to the provisions of this Act and such rules and regulations. If the Commission refuse so to accept and classify said lands, the applicant may appeal from the decision of the Commission to the circuit court in which such lands, or major part thereof, are located and the decision of the circuit court in all such matters shall be final. No application shall be made for a tract of land containing less than 40 acres; and no such land shall be classified for tax relief if the value of the land alone shall exceed \$10.00 per acre."

Upon a casual reading of this section it might appear that the Commission had unlimited power in approving and classifying lands as forest crop lands and in the continuance of that classification, or in the refusal to approve and classify lands as such.

Actually this is not true, as the law provides that the District Forester in the territory where the land is situated shall cause the lands first to be strictly examined as to the nature and quality, their suitability for the growing of wood and timber, the number of acres, and the value of same. Not less than 40 acres may be considered for classification, nor any tract, the value of which shall exceed \$10.00 per acre.

From the implication of some of the facts given in your letter it seems that land formerly valued at more than \$10.00 per acre might have been certified as forest crop lands. However these facts are not definitely stated, and in view of the fact that lands having an assessed value in excess of \$10.00 per acre at the time of such certification cannot be certified as forest crop lands, we will consider the implication as unimportant and will limit ourselves more closely to a further discussion of the facts involved in your inquiry.

Only after the preliminary examination of the District Forester, together with his recommendations concerning the classification of each tract, may the Commission approve the application and classify lands as forest lands.

It is also noted that in the event the Commission refuses to accept and classify any lands as forest lands, the applicant may take an appeal to the circuit court of the county in which the land lays. The court will then determine whether the Commission has abused its authority or has acted in an arbitrary manner in its refusal to accept or classify such lands, and presumably any other errors or irregularities that may have been committed in this connection will be corrected by the circuit court, from whose decision there is no

further appeal.

Once lands have been approved, accepted and classified as forest lands, they shall, so long as such classification continues be subject to the provisions of the Forestry Act and to such rules and reasonable regulations that may be promulgated by the Commission.

Forest crop lands are then relieved from partial taxation by Section 14431.106, Mo. R.S.A., which provides as follows:

"Any lands approved and classified by the Commission as forest crop lands as defined in this act shall receive partial relief from taxation, as hereinafter provided, during a period or periods of time not to exceed 25 years in any instance."

Section 14431.108, Mo. R.S.A., in effect provides that for general taxation purposes, forest crop lands shall be assessed for general tax purpose at the sum of \$1.00 per acre, so long as such classification continues. Said section reads as follows:

"During the time any such lands are classified as forest crop lands under this Act they shall be assessed for general taxation purposes at \$1.00 per acre and taxed at the local rates of the county wherein the lands are located."

Section 14431.110, No. R.S.A., provides that the state may pay to each county the sum of 2 cents per acre per year for each acre classified as forest land in lieu of taxes and reads:

> "The Commission shall determine as of January 1st of each year the number of acres of privately owned forest crop land which has been accepted in each county under this Act. The state may pay to each county in which these lands are situated a certain sum appropriated by law from general revenue funds or from the fund created in Section 18 hereof, as a grant in lieu of taxes, this sum to be 2 cents per acre per year for each acre so accepted. The Commission shall annually certify to the Director of Revenue and the State Auditor the amount payable to each county and the Treasurer is authorized to pay, and, after appropriations are made as herein provided, such amounts shall be paid to such counties on or before the first day of January following. This section shall not be retroactive."

It is noted that as long as any lands are classified as forest lands they shall be entitled to the partial relief from taxation mentioned above, and that the county shall receive the 2 cents per acre, indefinitely, but not longer than 25 years. In the event the Commission should find the provisions of the act are not being complied with, it then becomes its duty to cancel the classification, notify the owner, the assessor, and the county clerk of the county where the lands are situated. Thereafter such lands will not be relieved from partial taxation and will be taxed as other lands.

From the facts stated in your letter, it appears that lands classified as forest crop lands in your county were, previous to being so classified valued at more than \$10.00 per acre, and that you are wondering if these lands should not be currently assessed at more than \$1.00 per acre, also the duties of the assessor, county clerk, and collector.

Assuming that the land in your county was classified in accordance with the provisions of the Forestry Act, and particularly those sections noted above, the forest crop lands in question could not be assessed at more than \$1.00 per acre as long as they retained such classification; the owners would not be required to pay taxes based on any other valuation.

Section 14431.111a clearly defines the duties of the assessor, county clerk and collector, and which appears to fully answer your inquiry in this connection. Said section provides as follows:

"The assessor shall carry the assessment of all forest crop land on the assessor's book and the county clerk shall carry out the tax levy as levied by the different political subdivisions which are entitled to levy taxes on said forest land. The collector shall keep all records of all taxes due on said forest lands so that in the event the owner of such lands may desire to remove his land from the forest class, he may do so by paying all of the taxes carried against the land based on the assessment plus a penalty equivalent to 5% interest thereon, less taxes paid as set up by Section 8. Whenever this is done by the owner such land shall automatically be dropped from the forest crop land class."

CONCLUSION

Therefore, it is the opinion of this department that lands accepted and classified as forest crop lands by the Missouri Conservation Commission under the provisions of the Forestry Act would be entitled to a partial release from taxation, and that as long as said lands remained in said classification, they shall for general tax purposes be assessed at \$1.00 per acre; that the owners thereof shall not be required to pay taxes thereon at any other or different rate, and without regard to the assessed valuation on said lands previous to the time they were classified as forest lands.

The duties of the assessor, county clerk and collector with reference to the assessment, levy and collection of taxes on forest lands as set out in the Act are mandatory, and none of these officers have any lawful authority to change the method of assessment, levy, or rate of collection in any manner than that specifically prescribed in the said Act.

Respectfully submitted,

PAUL N. CHITWOOD, . Assistant Attorney General

APPROVED:

J. E. TAYLOR ATTORNEY GENERAL

PMC:nm

PROSECUTING ATTORNEYS

Not mandatory upon prosecuting attorney to file criminal information upon filing of complaint. Prosecuting attorney may use his discretion in this matter.

June 22, 1949

Mr. C. Dudley Brandom Prosecuting Attorney Daviess County Gallatin, Missouri



Dear Sir:

This department is in receipt of your request for an official opinion upon the following statement of facts:

"Would you kindly furnish this office with your opinion relative to the proper interpretation of Sections 2 & 5 of the Magistrate Court code of procedure in misdemeanor cases, Laws of Missouri 1945 at page 751 & 752.

"It appears that Section 2 provides that if a duly signed complaint is filed with the Magistrate or with the Prosecuting Attorney, that the Prosecuting Attorney MUST immediately file an information and proceed to try such a case, regardless of the merits, facts, evidence, or circumstances which would even possibly justify such action.

"However, Section 5 provides one technical instance in which the Prosecuting Attorney may use his discretion in prosecution, and thereby can cull out those instances in which actually no crime has been committed, where such action is not justified, or where such complaint is merely a grudge claim.

"It appears to the undersigned that such statutes should be interpreted so that the Prosecuting Attorney could proceed in any instance at his discretion, and that the following portion of Section 5 should apply to all complaints:

"'....and if, after investigation of such facts, the prosecuting attorney be satisfied that an offense has been committed, and that a case against the accused can be made, it shall be his duty!"

Section 2, Laws of Mo. 1945, page 751, to which you refer above, states:

"Prosecutions before magistrates for misdemeanors shall be by information, which shall set forth the offense in plain and concise language, with the name of the person or persons charged therewith: Provided, that if the name of any such person is unknown, such fact may be stated in the information, and he may be charged under any fictitious name; and when any person has actual knowledge that any offense has been committed that may be prosecuted by information, he may make complaint, verified by his oath or affirmation, before any officer authorized to administer oaths, setting forth the offense as provided by this section, and file same with the magistrate having jurisdiction of the offense, or deliver same to the prosecuting attorney; and whenever the prosecuting attorney has knowledge, information or belief that an offense has been committed, cognizable by a magistrate in his county, or shall be informed thereof by complaint made and delivered to him as aforesaid, he shall forthwith file an information with the magistrate having jurisdiction of the offense, founded upon or accompanied by such complaint."

This department does not believe that the language of the above quoted section contains anything which makes it mandatory upon a prosecuting attorney to institute criminal proceedings merely upon the filing of a complaint by an individual before an officer authorized to administer oaths.

Section 5 following states:

"Upon the filing of a complaint in a magistrate court, verified by the oath or affirmation of a person competent to testify against the accused, if the magistrate be satisfied that the accused is not likely to try to escape or evade prosecution for the offense alleged, it

shall be his duty to forthwith forward such complaint to the prosecuting attorney; and it shall be the duty of the complainant to forthwith inform the prosecuting attorney what facts can be proved against the accused, and by what witnesses, and the residence of such witnesses; and if, after investigation of such facts, the prosecuting attorney be satisfied that an offense has been committed, and that a case against the accused can be made, it shall be his duty to immediately file his information before the magistrate taking the complaint, and give to said magistrate a list of the witnesses to be subpoensed on the part of the state; and upon the filing of the information by the prosecuting attorney, as herein provided, with the magistrate, or upon the filing of an information by the prosecuting attorney upon his own information and belief, without complaint of a private individual having previously been filed, it shall be the duty of the magistrate to forthwith issue a warrant for the arrest of the defendant, directed to the sheriff, or, if no such officer is at hand, then to some competent person who shall be specially deputed by the magistrate to execute the same, by written indorsement to that effect on such warrant."

It is the opinion of this department that Section 5, quoted above, does, in that portion of the Section which is underscored (underscoring ours) very definitely invest the prosecuting attorney with discretion as to whether he will or will not file an information subsequent to the filing of a complaint.

This department believes that the aforementioned portion of Section 5 clarifies Section 2 and, as we said, clearly gives a prosecuting attorney discretion in these matters. However, for the purpose of further clarification we invite your attention to the case of State, on information of McKittrick, Attorney General, v. Wymore, Prosecuting Attorney, 132 S.W. (2d) 979. In this case the defendant Wymore, prosecuting attorney of Cole County, Missouri, was charged with an offense which, in essence, was failure to discharge his official duty to prosecute individuals within his jurisdiction, who were suspected of criminal actions. The general defense of the Prosecuting Attorney was that he was invested with discretion in the conduct of his office and in instituting

prosecution proceedings. In this case, in which a decision was handed down by the Supreme Court in 1939, the court made an exhaustive analysis of this matter of the discretion, in instituting criminal prosecutions, allowed to prosecuting attorneys. In the course of this discussion the court stated:

"He (the defendant Prosecuting Attorney) also argues that he is a quasi judicial official, and as such vested with discretion in the performance of duty.

"We also agree that in performing his duties he is authorized to exercise a sound discretion. However, 'there is nothing sacred about the words quasi judicial'. In Ex parte Bentine, 181 Wis. 579, 196 N.W. 213, 215, 216, it was correctly ruled as follows: 'A public prosecutor is a quasi judicial officer, retained by the public for the prosecution of persons accused of crime, in the exercise of a sound discretion to distinguish between the guilty and the innocent, between the certainly and the doubtfully guilty.' Of necessity, 'in distinguishing between the certainly and doubtfully guilty, the prosecuting attorney should make a reasonable effort to discover witnesses and interview them with reference to the facts. After doing so he should give careful consideration to both the law and the facts before determining the question of prosecution or no prosecution. He has no arbitrary discretion, and sound discretion is not usable as a refuge for unfaithful prosecuting attorneys.

"The rule is stated as follows:

"'It is the duty of the prosecuting attorney to initiate proceedings against parties whom he knows, or has reason to believe, have committed crimes. * * * The fact that his duties rise to the dignity of exercising discretion cannot excuse neglect of duty on his part. * *

"The contention made by the appellant is to the effect that, because a wide discretion is vested in the prosecuting attorney with reference to the prosecutions of parties for crime, the right of discretion must necessarily shield him from indictment or prosecution for omission to perform his duties. This court takes a contrary view of the law. It is the duty of the prosecuting attorney, under the statute, though endowed with discretion in the performance of his duties, to exercise his discretionary powers in good faith. Speer v. State, 130 Ark. 457, 198 S.W. 113, 114, 115. * * * * *

"He (the defendant Prosecuting Attorney) also argues that he was not compelled to sign, swear to and file complaints.

"We also agree that he is not compelled to do so. He may and should exercise an honest discretion in determining if he should make and file a complaint. Under Sec. 3467, R.S. 1929, Mo. St. Ann. Sec. 3467, p. 3110, he is not required to have 'first hand knowledge' to be qualified to make a complaint. State v. Frazier, 339 Mo. 966, 98 S.W. 2d 707, 712; State v. Layton, 332 Mo. 216, 58 S.W. 2d 454, 457. In this connection respondent stated 'that no request was ever made to him by any person to file a complaint or otherwise institute a prosecution for violation of the law!. He thereby admitted that he was authorized to make complaints.

* * * * * "The people of this state are not idiots. They know that a prosecuting attorney cannot, under his oath of office, hide behind Sec. 3505, R.S. 1929, Mo. St. Ann. Sec. 3505, p. 3130, which authorizes private persons to file complaints with the clerk of the circuit court or with the prosecuting attorney. If he could do so, the law-abiding citizens of the state would be helpless and at the mercy of the 'underworld'. It is well known that private persons rarely file complaints. They may subject themselves to costs and the hazard of an action for malicious prosecution. If a private person files a complaint, the prosecuting attorney is not compelled, for that reason, to file an information. However, it is his duty to make a reasonable investigation and then determine if an information should be filed."

From the above it is the conclusion of this department that a prosecuting attorney is not compelled to file a criminal information and thereby institute criminal prosecution proceedings against an individual or individuals simply because a complaint, under oath, is filed against such individual or individuals by some person or persons. We do believe that before such information is filed and criminal proceedings instituted by the prosecuting attorney, that it is his duty to make a thorough investigation of the complaint, and that if, after such an investigation, he is of the opinion that the complaint is not well founded and cannot be substantiated, that he should abstain from further proceedings in the matter.

It is the further opinion of this department that a prosecuting attorney owes as definite a duty to the person complained against to thoroughly investigate the charges made against such person before instituting criminal proceedings, as the prosecuting attorney owes to the commonwealth of the State of Missouri to protect it against criminals. It is the duty of the prosecuting attorney to protect innocent people against whom groundless charges are filed, either through malice or misinformation or inadequate information, from public prosecution and all of the injury to character and the feelings of the accused person which inevitably follow the filing of a criminal information and the institution of criminal prosecution proceedings, even though the result of the institution of criminal proceedings finally results in the acquittal of the accused.

CONCLUSION

It is the conclusion of this department that Sections 2 and 5 of the Magistrate Court Code of Procedure in Misdemeanor Cases, Laws of Mo. 1945, pages 751 and 752, do not make it mandatory upon a prosecuting attorney to file an information and institute criminal proceedings merely upon the filing of a complaint, under oath, by a person or persons charging another person or persons with the commission of a crime, but that the prosecuting attorney should make a thorough investigation of the charges made in the complaint, and, if he finds that such charges have a reasonable basis in fact, to proceed to file an information, but that if he finds that, in his opinion, they do not have, to abstain from instituting criminal proceedings.

Respectfully submitted,

HUGH P. WILLIAMSON Assistant Attorney General

APPROVED:

J. E. TAYLOR

DIVISION OF (A burial permit is necessary to accompany dead bodies HEALTH: moved out of this state by private conveyance but it is not necessary to have a transit permit to accompany such bodies transported out of this state by a private conveyance.

December 30, 1949

Mr. Clyde A. Bridger Director, Bureau of Vital Statistics Division of Health Jefferson City, Missouri

Dear Sir:

I.

We are in receipt of your letter of December 20, 1949, in which you request an opinion of this department upon the following question:

"I would like to have an opinion on whether a transit permit is necessary to accompany bodies moved out of state by private conveyance."

II.

Laws of Missouri, 1947. Volume 2, page 238, enacted new laws in regard to the registration of births and deaths in the state of Missouri, to be known as the Uniform Vital Statistics Act, and repealed Sections 9760 to 9783 inclusive. Section 28 of this new Act provides:

"When a death or still birth occurs or a dead body is found the body shall not be disposed of or removed from the registration district until a permit has been issued by the local registrar."

Section 38 of this same Act provides in subsection 2 thereof as follows:

"Any person who knowingly transports or accepts for transportation, interment or other disposition a dead body without an accompanying permit issued in accordance with the provisions of this act, shall be fined not more than \$500."

Section 9792, R. S. Mo. 1939, provides:

"It shall be the duty of the board of health, or health department, or (if no such board of health or health department exist) the town clerk of any city, town or village in the state of Missouri (or in the event there be no such existing officer, then any registered physician), to issue transit permit for each dead human body to be shipped from that city, town or village: Provided, it must appear that the body to be shipped has been prepared for shipment in accordance with the provisions of this article. The transit permit must show where and by whom issued, the name of the deceased, the age, the time and place of death, the cause of death (and whether contagious or infectious disease), the name of the physician or coroner making certificate, the name of the person preparing the body for shipment, and the destination thereof."

Section 9793, R. S. Mo. 1939, provides:

"No dead human body shall be offered to or accepted by any common carrier for transportation unless it is in a burial case, coffin or asket that is securely closed, and the burial case, coffin, or casket containing the body is in a wooden, metal or metal-lined box that is securely closed, and on the top of the box must appear the name of the deceased, the destination, the time and place of death, the cause of death, the name of the attending physician or coroner, the name of the person who prepared the body for shipment, and the body is accompanied by a transit permit as herein provided for."

Section 9794, R. S. Mo. 1939, provides:

"Any person, firm, company or corporation, or agent thereof, who shall fail, refuse or neglect to comply with any of the provisions of this article, or any part of such provisions, shall be deemed guilty of a misdemeanor, and, upon conviction thereof, shall be fined in the sum of not less than twenty-five dollars nor more than five hundred dollars, or by imprison-

ment in the county jail for not less than thirty days nor more than sixty days, or by both such fine and imprisonment."

Section 38 cited above, makes it a criminal offense for anybody to transport or accept for transportation a dead body without a permit issued in accordance with the provisions of the Uniform Vital Statistics Act, therefore, a permit must be obtained in accordance with the requirements of Section 28 of the Uniform Vital Statistics Act before a dead human body may be moved within this state or from this state by any means of transportation.

Sections 9792, 9793, 9794 relate to the transportation of dead human bodies by common carrier. Article III of chapter 57, of the Revised Statutes of Missouri, 1939, was enacted in 1909 (Laws 1909, page 664). The title of the original Act was "An Act relating to the transportation by common carrier of dead human bodies; * * *"

While the title of an act of the Legislature is no part of the law, it may be given consideration in determining the legislative intent as to the scope of the Act. At the time the Act was passed the usual method of transportation of bodies was by common carrier. Transportation by private conveyance, except locally, was rare. The clear intent of the General Assembly was to regulate the transportation of bodies by common carrier and not otherwise.

The United States circuit court of appeals in the case of Arnold v. United States, 115 Fed(2d) 553, had for consideration the construction of a criminal statute making it a criminal offense for any person who shall knowingly ship or cause to be shipped, intoxicating liquor in interstate commerce without labeling the packages on the outside so as to show the name of the consignee, the nature of the contents, and the quantity contained in the package. The court held:

"# * The primary idea of the verb 'ship' is to place on board a ship or vessel for transportation. It is defined in Webster's International Dictionary to mean, 'To commit to any conveyance for transportation.' It is very commonly used as meaning the act of delivering to a carrier for shipment.

The words 'ship' and 'shipment' are now generally used to express the idea of goods delivered to carriers for the purpose of being transported from one place to another, and such signification is given to them by lexicographers generally. Webster's International Dict.; the Century Dict. The law dictionaries give substantially the same definitions. # # # It is true that the word is susceptible of meaning to carry or transport, but that is

neither its primary nor ordinary meaning, and here we are considering a criminal statute. If this section be construed as referring only to one who delivers to a carrier goods for transportation, then the entire act seems to be a reasonable regulation of both the carrier and the shipper of intoxicating liquor. In view of the evils sought to be remedied and the situation existing at the time of the adoption of this act, we think it should be limited to the preparation and delivery of packages of intoxicating liquor to a common carrier for transportation in interstate commerce. One Truck Load of Whisky v. United States, 6 Cir., 27h F. 99; United States v. Eightyseven Barrels of Wine, D.C. Vt. 180 F. 215; United States v. Freeman, 239 U.S. 117, 36 S.Ct. 32, 60 L. Ed. 172. The evidence is undisputed that the transportation here under consideration was not by common carrier. As we have pointed out, at the time this statute was enacted, the evil sought to be remedied arose entirely through interstate transportation of intoxicating liquor by common carrier. * * *

"The words 'ship' or 'cause to be shipped' ordinarily apply to transportation by common carrier, and at least at the time of the adoption of this law were intended to apply only to common carriers. If, therefore, private carriers are to be included, it must be effected solely by judicial construction. However desirable it might be to have the law include private carriers, it is not the province of the court in a criminal case to create an offense by construction. * * * *"

We believe that the words "to be shipped" as used in Section 9792 and the words "shipped" and "shipment" as used in that section and in Section 9793 apply only to the transportation of dead human bodies by common carrier. This Article III of chapter 57 of the Revised Statutes of Missouri, 1939, was enacted to protect the public from disease that might be communicated by the shipment of dead bodies. Since it is a criminal violation under Section 9794 to ship a dead body without a transit permit then we construe the verb "to ship" to mean transportation by common carrier and not by private conveyance.

CONCLUSION

A burial permit is necessary to accompany dead bodies moved out of this state by private conveyance but it is not necessary to have a transit permit to accompany such bodies transported out of this state by a private conveyance.

Respectfully submitted,

Assistant Attorney General

APPROVED:

J. E. TAYLOR Attorney General

SJM:mw

WITNESS FEES:

A state witness, testifying as an expert witness, can only claim the ordinary witness fee, and cannot refuse to give testimony because he has not previously been tendered a fee as an expert witness.

January 24, 1949

Honorable Herbert S. Brown Prosecuting Attorney Grundy County Trenton, Missouri FILED 12

Dear Mr. Brown:

This department is in receipt of your letter of recent date in which you state that in the trial of a pending criminal case in your county you deem it necessary to call as expert witnesses two staff physicians employed at State Hospital No. 1 at Fulton, Missouri. You further state that you have contacted these two aforesaid physicians in regard to their appearance as expert witnesses for the state, and that you have been informed by them that they would so appear and so testify only after the guarantee by you of a fee for testifying as an expert witness. You also further state that you desire an opinion from this office whether or not these two aforesaid physicians may legitimately claim a professional fee for testifying as expert witnesses, that is, a fee greater than that paid an ordinary witness.

In the case of Burnett v. Freeman, 125 Mo. App. 683, Judge Ellison, who wrote the opinion in this case, stated: "Whether a physician could be allowed to charge for his services as a witness as an expert has been a question upon which the courts have entertained widely divergent views.* * *"

Judge Ellison then proceeds to give a lengthy and thorough summary of decisions relating to this point as of the time at which the decision was rendered, which was May 20, 1907. We do not deem it necessary to induct here all of his discussion. His conclusion, as found in this aforesaid opinion, is as follows: (1.c. 687)

"After consideration of the question in all its bearings, we have arrived at the conclusion that a witness called to testify as an expert, whether as a physician or in any other branch of knowledge, may be compelled to state his opinion upon hypothetical or other questions involving his professional knowledge, without compensation other than the witness fee taxed to the ordinary

witness. It is a duty he owes to the State in aid of its orderly existence and in return for which he enjoys its protection and the administration of its laws in his behalf; not least of which would be the compulsion of other experts, whether they be the man who practices a profession, the artisan, the artist, the tradesman or other person to come to his aid when needed in litigation in which he might unfortunately be involved. Indeed, in this very case the plaintiff invoked the special knowledge of his professional brethren in aid of the price he charged for the attendance upon the court, and there was no thought of it not being their bounden duty to give to the court and jury, in his behalf, the benefit of their information derived through the experience and study of their profession."

In the case of State v. Bell, 212 Mo. 111, a case decided May 19, 1908, in which the issue decided in the Burnett case was also present, which issue is the same one that now confronts you, Judge Gant, who wrote the opinion of the court, took the same position which had been taken in the Burnett case. In discussing this point, Judge Gant said:

"Defendant also complains of the action of the court in refusing to require Dr. Schaffer, a physician and witness for the defendant, to answer a question as to whether a certain incurable disease after running six or eight months or a year, would cause paralysis. this question was propounded to the witness he answered that that was specialized question and he expected to receive remuneration if he was required to give expert testimony. And the court sustained the witness in his refusal to answer until he had first received his fee for his opinion as an expert. In so ruling we think that the learned circuit court erred. Whether a physician called to testify as an expert may be compelled to state his opinion upon a hypothetical or other question involving his professional knowledge without compensation other than the witness fees allowed all other witnesses by law, has been a much mooted question.

In Burnett v. Freeman, 125 Mo. App. 683, the authorities on both sides of the proposition were carefully collated by Judge Ellison, and the conclusion was reached by the Court of Appeals that a witness called to testify as an expert, whether a physician or an expert in any other branch of knowledge, could be compelled to state his opinion upon a hypothetical or other question involving his professional knowledge without further compensation than that allowed by law to other witnesses. the court: 'It is the duty he owes to the State in aid of its orderly existence and in return for which he enjoys its protection and the administration of its laws in his behalf; not least of which would be the compulsion of other experts, whether they be the man who practices a profession, the artisan, the artist, the tradesman or other person to come to his aid when needed in litigation in which he might unfortunately be involved * * * *It should be remembered that the duty the expert owes to the State. as a performance of citizenship, rather than a rendering of service to an individual, pertains to an obligation to give the court the benefit of the knowledge he has in store at the time he is called upon. He cannot be required to especially fit himself for lines of inquiry. He should not be expected to make examinations, perform professional service and the like. For that is not the office of a witness. He could not be compelled to do that any more than an ordinary person, with no knowledge of the facts pertaining to a case, should be required to go and post himself so as to become a witness.' After a full consideration of the various cases and the very satisfactory opinion of the Court of Appeals, we think that the Court of Appeals reached the proper conclusion on this question and supported it by satisfactory reasoning.* * *"

In the case of Klepper v. Klepper, 199 Mo. App. 295, a case decided April 2, 1918, the court in ruling upon this point, states:

"Plaintiff complains of the court's ruling on her motion for suit money to enable her to make her defense to defendant's motion to modify the judgment. Plaintiff called as witnesses two real estate brokers who, at plaintiff's instance, had examined the property at Locust street and Garrison avenue above mentioned, and who testified as experts concerning the value thereof. It appears that for their services in making such examination and for testifying plaintiff, through her counsel, had agreed to pay each of them the sum of \$50; and there was testimony that this was the reasonable value thereof. It is contended that the court should have made an allowance to cover this expense and ought to have allowed a larger amount as counsel fees.

"These expert witnesses were not entitled to demand more than the usual witness fees for giving their testimony in the case as witnesses merely; and plaintiff could not make a binding contract to pay them more than the usual witness fees for services as witnesses (Burnett v. Freeman, 125 Mo. App. 683, 103 S.W. 121; State v. Bell, 212 Mo. 111, 1.c. 126, et seq.). they were entitled to demand reasonable compensation for services which the law does not compel them to render as witnesses for the usual witnesses fees, such as examining the property and gathering information and data on which the base their opinions as to its value (Burnett v. Freeman, supra; State v. Bell, supra). And for expenditures of this character, if reasonably necessary to be incurred and actually incurred in preparing her defense to defendant's motion, plaintiff was entitled to a reasonable and proper allowance.* * *"

In the case of Shelton v. McHaney, 343 Mo. 119, the court after discussing the facts in the case, which fact revealed the hiring of, and payment to, witnesses of expert witness fees, says:

"* * *These facts differentiate this case from the Missouri cases cited by plaintiffs, * * 7 .

viz., Burnett v. Freeman, 125 Mo. App. 683, 103 S.W. 121, 134 Mo. App. 709, 113 S.W. 488; State v. Bell, 212 Mo. 111, 126 (III), 111 S.W. 24, 28 (3); and Klepper v. Klepper, 199 Mo. App. 294, 300 (II), 202 S.W. 593, 595 (4,5), which are to the effect expert witnesses are not entitled to compensation in addition to regular witness fees for services as a witness but may legally receive such compensation for other services performed in connection with their testimony (see 70 C.J.,pp. 75-77, secs. 86-88).* **

Since the decision in the Shelton v. McHaney case, supra, there have been no subsequent decisions which alter the law upon this point.

CONCLUSION

In view of the unanimity of Missouri decisions upon your point of inquiry, we are of the opinion that an expert witness is in the same category as an ordinary witness, and that he cannot refuse to give expert testimony without previously having been tendered or guaranteed a fee as an expert witness.

It is our suggestion that in the case of the two physicians at State Hospital No. 1 in Fulton, Missouri, that you issue a subpoena for their appearance as witnesses for the state, that you tender them their mileage and one day's witness fees. If they refuse to answer this subpoena they can be proceeded against in the same manner that any witness may be proceeded against for refusal to answer a subpoena.

Respectfully submitted,

HUGH P. WILLIAMSON Assistant Attorney General

APPROVED:

J. E. Taylor Attorney General TAXATION: Soldiers' & Sailors' Civil Relief Act
exempts person in military service from
personal property taxation, unless
residence actually established in Missouri

February 10, 1949

Hon. William F. Brown
Prosecuting Attorney
Pettis County
Sedalia, Missouri

Dear Sir:

We have received your request for an opinion of this department, which request is as follows:

"Several weeks ago Mr. J. H. Green, Pettis County Court Clerk, together with the Pettis County Assessor, Pettis County Collector, and the County Court acted to strike from the assessment list and to refund personal tax paid by two members of the armed forces on active duty, temporarily residing in Sedalia and assigned to recruiting services.

"Under date of February 3, 1949, Mr. C. C. Nance, acting supervisor, county department, department of revenue, advised Mr. Green by letter that he would not honor the Court order abating the tax and citing as his reason Section 6 of Article 10 of the Constitution of Missouri, and Section 5, page 1800, of Laws of Missouri, 1945. In addition he enclosed an Attorney General's opinion written by William Orr Sawyers, Assistant Attorney General, under date of May 18, 1934.

"I respectfully call your attention to Section 574 at page 196, Title 50 of the U. S. C. A., relating to the exemption for personal tax of members of the armed forces. It was under and by virtue of the Soldiers and Sailors Relief Act and this specific provision that I advised the Court officials that they could not assess and collect a personal property tax of these men who are temporarily stationed here.

"Will you kindly write me an opinion stating whether or not the personal property of a member of the armed forces temporarily stationed in Pettis County, or in any county for that matter, is subject to assessment and taxation."

Section 17 of the Soldiers' & Sailors' Civil Relief Act of 1940, as amended, 50 U.S.C.A., Appendix, Section 574, provides as follows:

"(1) For the purposes of taxation in respect of any person, or of his personal property, income, or gross income, by any State, Territory, possesion, or political subdivision of any of the foregoing, or by the District of Columbia, such person shall not be deemed to have lost a residence or domicile in any State, Territory, possession, or political subdivision of any of the foregoing, or in the District of Columbia, solely by reason of being absent therefrom in compliance with military or naval orders, or to have acquired a residence or domicile in, or to have become resident in or a resident of, any other State, Territory, possession, or political subdivision of any of the foregoing, or the District of Columbia, while, and solely by reason of being, so absent. For the purposes of taxation in respect of the personal property, income, or gross income of any such person by any State, Territory, possession, or political subdivision of any of the foregoing, or the District of Columbia, of which such person is not a resident or in which he is not domiciled, compensation for military or naval service shall not be deemed income

for services performed within, or from sources within, such State, Territory, possession, political subdivision, or District, and personal property shall not be deemed to be located or present in or to have a situs for taxation in such State, Territory, possession, or political subdivision, or district: Provided, That nothing contained in this section shall present taxation by any State, Territory, possession, or political subdivision of any of the foregoing, or the District of Columbia in respect of personal property used in or arising from a trade or business, if it otherwise has jurisdiction. This section shall be effective as of September 8, 1939, except that it shall not require the crediting or refunding of any tax paid prior to October 6, 1942.

"(2). When used in this section, (a) the term 'personal property' shall include tangible and intangible property (including motor vehicles), and (b) the term 'taxation' shall include but not be limited to licenses, fees, or excises imposed in respect to motor vehicles or the use thereof: Provided, That the license, fee, or excise required by the State, Territory, possession, or District of Columbia of which the person is a resident or in which he is domiciled has been paid."

Although this particular section appears not to have been passed upon by the courts of this state, or any other jurisdiction, the validity of the Soldiers' & Sallors' Civil Relief Act, generally, has been upheld on numerous occasions. United States v. Alberts, 59 Fed. Supp. 298; Rading v. Ninth Federal and Savings Loan Ass'n, 55 Fed. Supp. 361, 371 (8), Ann.,130 A. L. R. 775.

Under the section above quoted a person in military service does not acquire a residence by reason of his being stationed within a state on military duty. His liability for personal property taxes would depend upon whether or not he had actually established a residence, which would in turn depend upon whether

or not he maintains a permanent residence in another state. If he does so, he would not be subject to personal property taxation while stationed in Missouri on military duty.

The opinion of Mr. Sawyers, to which you referred in your request, is dated May 18, 1934, which was, of course, prior to the adoption of the Soldiers' & Sailors' Civil Relief Act. In view of the provisions of that act, that opinion no longer represents the law in this state.

Conclusion.

Therefore, it is the opinion of this department that, under Section 17 of the Soldiers' & Sailors' Civil Relief Act of 1940, as amended, 50 U. S. C. A., Appendix, Section 574, a person stationed in Missouri on military duty is not subject to personal property taxation, unless he has actually established a residence in this state and does not maintain a permanent residence or domicile elsewhere.

Respectfully submitted

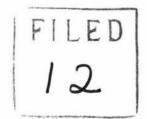
ROBERT R. WELBORN Assistant Attorney General

APPROVED:

J. E. TAYLOR Attorney General FORGERY: An information charging forgery of a check on an individual, drawn on an incorporated bank or trust company, should be filed under Section 4571, Mo. R. S. A. 1939.

June 30, 1949

Mr. William F. Brown Prosecuting Attorney Sedalia, Missouri



Dear Mr. Brown:

This office is in receipt of your recent request for an official opinion upon the following set of facts as embodied in your letter of inquiry to us:

"I have recently filed a charge on forgery involving the check following, which is copied:

"Sedalia, Mo. Feb. 2, 1949 "80-1783 865

"SEDALIA BANK & TRUST CO.

"Pay to the order of Betty Weathers \$45.96

"45 Dollars - - - - - - - - - - - - - - - Dollars

"Jack Morris

"This information was drawn under Section 4571, particularly under that which reads 'Second, any order or check being or purporting to be drawn on any such incorporated bank or trust company, or any cashier thereof, by any other person, company or corporation * * *. It is my thought that the language of this Statute is clear in its meaning, however, after reading State vs. Gibson, 244 Missouri 215, it appears that the Supreme Court takes the attitude that this Section applies only to banks.

"Also I would like to call your attention to

State vs. Milligan, 170 Missouri, Page 215. To further confuse the issue, I would like to call your attention to State v. Dobbins, 174 South West Second 171.

"I have discussed this matter with Judge Dimmitt Hoffman, our Circuit Judge and he informs me that he is also confused as to the difference between the apparently clear meaning of the Statute above referred to and the remarks made by the Supreme Court in passing upon the various degrees of forgery.

"I am perfectly willing to concede that a check such as the one involved in the recent case should preced under Section 4579, however, I am not able to reconcile the language used in Section 4571 with the Supreme Court decisions.

"I would, very much, appreciate it if you will advise me as to whether a check as set forth above, assuming it to be forged, should have the information drawn under Section 4571 or Section 4579, and I will appreciate an early response."

We will discuss the cases cited above by you, from the viewpoint of their bearing upon your instant case, and in their chronological order.

In State v. Milligan, 170 Mo. 215, decided in 1902, the cause of action arose by reason of the defendant drawing a promissory note payable to himself, forging thereto the names of two individuals, and subsequently assigning the note to another person in payment of a debt owed by the defendant to this third person. Later the drawer of the note was arrested and charged with forgery under Section 2009, R. S. Mo. 1899, which is our present section 4579, Mo. R.S.A. 1939, which section reads:

"Every person who, with intent to injure or defraud, shall falsely make, alter, forge or counterfeit any instrument or writing, being or purporting to be the act of another, by which any pecuniary demand or obligation shall be or purport to be transferred, created, increased, discharged or diminished, or by which any rights or property whatsoever shall be or purport to be transferred, conveyed, discharged, increased

or in any manner affected, the falsely making, altering, forging or counterfeiting of which is not hereinbefore declared to be a forgery in some other degree, shall, on conviction, be adjudged guilty of forgery in the third degree."

This section, it will be observed, charges forgery in the third degree, which, at the time the Milligan case was tried, carried punishment of imprisonment for not less than five years nor more than seven years. Punishment for forgery in the second degree at that time was imprisonment for not less than five years nor more than ten years. However, in this case, which charged forgery in the third degree, an instruction was given on behalf of the state which carried the punishment proper under a charge of forgery in the second degree. The section, in 1902, which charged forgery in the second degree, was 2001, our Section 4571, which states:

"Every person who shall forge or counterfeit, or falsely make or alter, or cause or procure to be forged, counterfeited or falsely made or altered: First, any promissory note, bill of exchange, draft, check, certificate of deposit, or other evidence of debt, being or purporting to be made or issued by any bank or trust company incorporated under the laws of this state, or of any other state, territory, government or country; or, second, any order or check being or purporting to be drawn on any such incorporated bank or trust company, or any cashier thereof, by any other person, company or corporation, shall, upon conviction, be adjudged guilty of forgery in the second degree."

The conviction of the defendant in the Milligan case was reversed on the grounds indicated above.

In the course of the Milligan opinion (page 223) the court states:

"It will be observed that the promissory note or other evidence of debt mentioned in Section 2001, supra, (Our 4571) must be one being, or purporting to be, made or issued by some incorporated bank or cashier thereof * * *."

In this statement the court was correct, for it was referring only to that part of Section 2001, the first part, which was applicable to the case which the court was deciding, to-wit, the forging of a promissory note. And the first part of section 2001 specifically brings within its compass "promissory notes * * *or other evidence of debt." We do not believe that in their statement the court was referring to all of section 2001.

In State v. Gibson, 244 Mo. 215, the court says:

"Sections 4643 and 4644 (our 4571 and 4572) apply to instruments purporting to be executed by a bank. State v. Milligan, 170 Mo. 223."

Here again we believe that the court was correct for the same reason that it was correct in the Milligan case, namely, because the case which it was deciding was one concerning a promissory note, and that the court was therefore referring to part 1 of Section 4643 (our 4571).

However, in State v. Dobbins, 174 S.W.(2d) 171, we are constrained to believe that the learned Supreme Court of Missouri was in error when it stated (page 172) "that Section (4571) applies 'only to instruments purporting to be executed by a bank.' State v. Gibson, 244 Mo. 215," because the forged instrument in this case was a check, which is specifically mentioned in the second part of Section 4571, which states: "or, second, any order or check being or purporting to be drawn on any such incorporated bank or trust company or any cashier thereof, by any other person, company or corporation, * * *."

We invite your attention to other cases which appear to us to support our position in regard to the interpretation of Section 4571, all of them cases cited under Section 4571, Mo. R.S.A. 1939.

In State v. Washington, 259 Mo. 335, a 1941 case, the defendant forged a name to a check drawn on a bank, which check was made payable to the defendant. The information was filed under Section 4643, R.S.Mo. 1909, which was Section 2001, R. S. Mo. 1899, and which is our Section 4571. No question was raised by the defendant or the court to the effect that the information was not drawn under the proper section.

A similar fact situation occurred in State v. Stegner, 276 Mo. 427, a 1917 case, in which the conviction was affirmed.

Mr. William F. Brown

Also in State v. Socwell, 318 Mo. 742, a 1927 case.

State v. Jacobson, 152 S.W.(2d) 1061, a 1941 case, establishes the same proposition, which is likewise supported by many other Missouri cases, all decided subsequent to 1902, the date of the Milligan case.

CONCLUSION

It is the conclusion of this department that where a person is charged with forging the name of another individual to a check drawn upon an incorporated bank or trust company, that the information under which he is prosecuted should be drawn under Section 4571, R. S. M. Mo. 1939, charging forgery in the second degree.

Respectfully submitted,

HUGH P. WILLIAMSON Assistant Attorney General

APPROVED:

J. E. TAYLOR Attorney General INTOXICATING LIQUOR:

Missouri licensed wholesaler may not sell intoxicating liquor to persons other than licensed retailers

January 13, 1949

Honorable Edmund Burke Supervisor Department of Liquor Control Jefferson City, Missouri FILED 13

Dear Sir:

Reference is made to your request for an official opinion of this office reading in part as follows:

"For the past year or more, people having only an RLD Tax Stamp issued to them in the State of Oklahoma by the Treasury Department of the United States and no other pretense of a retail license have been going to four wholesale houses in Cairo, Illinois, and purchasing large quantities of intoxicating liquor from these wholesale houses with the billing destination as somewhere in Oklahoma. The State of Illinois has not collected any tax on this liquor going into the State of Oklahoma.

* * * * * * * * * *

"One of our licensed distributors, in the State of Missouri, to wit: the 'John Doe Distributing Company,' which is owned by 'Richard Roe' and who has one place at St. Louis and another at Joplin, has asked me to request you for an official opinion as to whether or not a duly licensed Missouri wholesaler may, under his license, sell intoxicating liquor at his licensed wholesale premises to a person who has an RLD Tax Stamp issued to him by the Federal Government, at some address in Oklahoma but who has no retail dealer's license issued to him by the State of Oklahoma or by the State of Missouri, provided, of course, that the proper Missouri liquor

stamps are attached to the liquor which would be sold to such a person, and provided this liquor is to be taken to the State of Oklahoma. We are not concerned in this request as to whether or not such sale would violate any Federal law or any law of the State of Oklahoma, but this inquiry pertains only to whether such sale would violate any law of the State of Missouri, 'Mr. Roe' claims that he has checked with the Federal authorities and that they have stated to him that such sale would not violate the Federal laws: however, this is a matter between the wholesaler and the Federal enforcement officials and is not one concerning which I am asking an opinion."

We have taken the liberty of substituting the name of "John Doe Distributing Company" and the name of "Richard Roe" for those appearing in your letter.

Section 4898, Mo. R.S.A., relates to the license fees and authorization conferred under various types of permits issued by the Missouri Department of Liquor Control. Your attention is directed to the portion of the statute referred to, reading in part as follows:

"No person, partnership, association of persons or corporation shall manufacture, distill, blend, sell or offer for sale intoxicating liquor within this state at wholesale or retail, or solicit orders for the sale of intoxicating liquor within this state without procuring a license from the supervisor of liquor control authorizing them so to do. For such license there shall be paid to and collected by the director of revenue annual charges as follows: * * * * * * for the privilege of selling intoxicating liquor containing not in excess of five (5%) per cent of alcohol by weight by a wholesaler to a person duly licensed to sell such malt liquor at retail the sum of fifty (\$50.00) dollars; for the privilege of selling intoxicating liquor containing not in excess of twenty-two (22%) per cent of alcohol

by weight by a wholesaler to a person duly licensed to sell such intoxicating liquor at retail the sum of one hundred (\$100.00) dollars; for the privilege of selling intoxicating liquor of all kinds by a wholesaler to a person duly licensed to sell such intoxicating liquor at retail the sum of two hundred fifty (\$250.00) dollars; * * "

You will note that each of such permits authorize sales by wholesalers only to persons having retail licenses. Further, we find the following as a part of Regulation No. 6, promulgated by the supervisor of liquor control, page 109 of the Rules and Regulations of the Supervisor of Liquor Control:

"(a) Shipments by wholesalers or solicitors will be made only to licensed dealers of this or other states. A bill of lading will be secured from the carrier and kept on file for a period of two years, so that shipments can be traced by our auditors or inspectors."

From the foregoing, it is apparent that the General Assembly has seen fit to limit the sales made by wholesalers to persons holding retail permits and that this construction has been followed in the departmental regulation referred to.

We do note in your letter of inquiry that the sale described therein is proposed to be made to a person holding what is denominated as "RLD" tax stamp issued by the Treasury Department of the United States. Examination of Title 26, Section 3250, U.S.C.A., discloses that such a retail liquor dealer's stamp is merely an occupational tax imposed by the Federal government. It is not an authorization to engage in the retail selling of intoxicating liquor, but on the contrary is a mere revenue fee. Furthermore, the Congress of the United States has specifically provided, under Title 26, Section 3276, U.S.C.A., that the payment of such tax shall not be held to exempt the payer thereof from any penalty or punishment provided by the laws of any state for carrying on such business within such state, nor that the payment of such tax shall be in any manner construed to authorize the commencement or continuance of any trade or business contrary to the laws of such state. We take notice of the fact that retail sales of intoxicating liquor are not permitted under the laws of the State of Oklahoma and that no license authorizing such sales may be procured from that state.

CONCLUSION

In the premises we are of the opinion that a licensed wholesale dealer in intoxicating liquors in Missouri may not make sales of intoxicating liquor to a person who does not hold a retail liquor dealer's permit in Missouri or in some other state.

Respectfully submitted,

WILL F. BERRY, JR. Assistant Attorney General

APPROVED:

J. E. TAYLOR Attorney General Liquor Control:
Appropriation:
Refund Appropriation:

Appropriation to refund cancelled beer stamps may be paid to assignee of party to whom appropriation is made.

March 14, 1949

FILED 13

Mr. Edmund Burke, Supervisor Department of Liquor Control Jefferson City, Missouri

Dear -Sir:

ur opinion request of December 27, 1948 is as follows:

"The Legislature of the State of Missouri by Section 9.210 of House Bill No. 484 appropriated out of the State Treasury, chargeable to the General Revenue Fund, the sum of \$214.33 to purchase beer stamps to be refunded to the Capitol Brewery, Inc. to replace stamps not used and cancelled by it upon the direction and under the supervision of the Supervisor of Liquor Control for the period beginning January 7, 1948, and ending June 30, 1948. The Capital Brewery, Inc. was declared bankrupt in the United States District Court of the Western District of Missouri at Jefferson City, Missouri, and Lester Seacat was appointed Trustee. The Trustee in Bankruptcy, assigned the above referred to claim for refund to the Capitol Products Company. The Capitol Products Company now claims that it is entitled to the stamps.

"Will you please advise me if we can procure the stamps from the Director of Revenue for the Capitol Brewery, Inc. and then turn these stamps over to the Capitol Products Company upon the strength of the assignment herein referred to.

"Copies of the Assignment and the Order of the Referee in Bankruptcy are hereto attached."

Section 9.210, Laws 1947, Vol. 2, page 183 is as follows:

There is hereby appropriated out of the State
Treasury, chargeable to the General Revenue Fund,
the sum of (\$125,842.11), or so much thereof
as may be necessary to purchase liquor and beer
stamps to be refunded to the following named persons
or companies to replace stamps not used and cancelled,
upon the direction and under the supervision of the
Supervisor of Liquor Control, for the period begin-

ning January 7, 1948 and ending June 30, 1948 . . . Capitol Brewery, Inc.,
Jefferson City, Missouri 190.84
23.49 214.33"

It is well to state at the outset that no particular provision of law exists under which there is statutory directions for the destruction of liquor and beer stamps under the supervision of the Supervisor, so as to lay the basis for making application for refund by way of relief appropriations, as was done here. However, in 59 C. J. Section 436 page 285 it is said

"In the absence of a constitutional prohibition, the legislature may take on itself the adjustment and settlement of claims . . "

State v. Draper 44 Mo. 245 appears to adopt this rule in Missouri, because there the court directed a claim to be paid by the auditor in the following language:

"The Legislature audited and settled the claim, and fixed the exact sum to be paid. The auditor has no discretion in the premises. The Act (of the Legislature) is conclusive of the indebtedness and its amount. The auditor has nothing to do with its propriety or justice . . "

Our examination of the Constitution discloses no prohibition against the General Assembly's auditing and settling a claim for refund of taxes.

There is, however, another question to be considered in connection with the opinion. It arises from the fact that it is the Capitol Products Company which seeks this refund as assignee of the Capitol Brewery, Incorporated. The question is whether such a claim is assignable.

State v. Draper, supra, affords authority to conclude that such claim is a chose in action, enforceable by writ of mandamus.

Mandamus is an action at law. State ex rel Horton v. Bourke, Mo. Sup. 129 SW 2nd 866,868. In Bullock v. E. B. Gee Land Co. Mo. Sup. 148 SW 2nd. 565, 570 the rule is stated:

"'One may purchase a cause of action at law and enforce all legal rights which go with it, but the right to appeal to the conscience of a court of equity cannot be bought or sold."

It naturally follows from the above that a chose in action being capable of being sold is capable of being assigned.

The assignment attached to your opinion request, and court order supporting the same, appear to be sufficient in form to transfer title to the chose in action in question.

In passing upon this request we feel that we should mention one outstanding fact which prevents the payment of this appropriation at this time. Said appropriation was made for the period beginning January 7, 1948 and ending June 30, 1948. Under Section 28, Article IV, Constitution of Missouri 1945, it provides that no appropriation shall confer authority to incur an obligation after the termination of the fiscal period to which it relates and further that every appropriation shall expire within six months after the end of the period for which it was made. Since this appropriation ended on June 30, 1948, under Section 28, Article IV, supra, after December 31, 1948, none of the funds so appropriated could be expended.

CONCLUSION

It is therefore our opinion that the Department of Liquor Control could honor the claim of the Capitol Brewery, Inc., as assigned to the Capitol Products Company, and turn over to the latter concern as assignee, stamps to the extent authorized by the General Assembly, if it were not for the fact said appropriation expired on December 31, 1948 by virtue of Section 28, Article IV, Constitution of Missouri 1945, which provides that every appropriation shall expire within six months after the end of the period for which it is made.

Respectfully submitted,

LAWRENCE L. BRADLEY Assistant Attorney General

APER OVED:

J. E. TAYLOR ATTORNEY GENERAL

LLB:FG

INTOXICATING LIQUORS:

Permits for the sale of intoxicating liquor by the drink at retail may be issued only in cities containing more than twenty thousand inhabitants according to the last Federal decennial census.

March 16, 1949

4.12

Mr. Edmund Burke Supervisor Department of Liquor Control State Office Building Jefferson City, Missouri

Dear Sir:

Reference is made to your inquiry of recent date for an official opinion of this department reading as follows:

"I have received two applications for retail liquor by the drink licenses in the City of Cape Girardeau.

"As you no doubt have been informed, the United States Department of Commerce, Bureau of Census recently completed a pretest census in the City of Cape Girardeau. A report issued September 1, 1948, by the Bureau of Census showing the results thereof states that, according to this pretest census, the City of Cape Girardeau now has a population of 20,208 persons. Under date of August 30, 1948, I wrote a letter to the Department of Commerce, Bureau of Census, a copy of which I attach hereto. Under date of September 7, 1948, I received a reply to my letter from the Department of Commerce, Bureau of Census, copy of which I attach hereto.

"Section 4890, R. S. Mo. 1939, provides as follows:

"'Provided, that no license shall be issued for the sale of intoxicating liquor, other than malt liquor containing alcohol not in excess of five (5%) per cent by weight, by the drink at retail for consumption on the premises where sold, in any incorporated city having a population of less than twenty thousand (20,000) inhabitants, until the sale of such intexicating liquor, by the drink at retail for consumption on the premises where sold, shall have been authorized by a vote of the majority of the qualified voters of said city. Such authority to be determined by an election to be held in said cities having a population of less than twenty thousand (20,000) inhabitants, under the provisions and methods set out in this act. The population of said cities to be determined by the last census of the United States completed before the holding of said election: * *

(Underscoring ours.)

* * * * * * * * *

"However, inasmuch as my decision on these applications may result in court action, I deem it advisable to secure your official opinion as to whether or not licenses to sell liquor at retail by the drink in Cape Girardeau may now be issued by me to persons who possess the requisit qualifications prescribed by the Liquor Control Act."

Your inquiry resolves itself into the question of whether or not the "pretest" census conducted by the Bureau of Census may be accepted as the "last census of the United States" as that term is used in Section 4890, R. S. Mo. 1939 quoted in your letter.

In construction of statutes the lode star is the determination of the intent of the General Assembly in enacting the law. This rule has been declared by the Supreme Court in State ex rel. v. Trimble, et al. 34 S.W. (2) 1103, wherein, quoting approvingly from Grier v. Railways Company, 228 S. W. 454, the court said:

"The primary rule for the interpretation of statutes is that the legislative intention is to be ascertained by means of the words it has used." Further, Section 655, R. S. Mo. 1939 provides additional rules for the construction of statutes among which we find the following:

"The construction of all statutes of this state shall be by the following additional rules, unless such construction be plainly repugnant to the intent of the legislature, or of the context of the same statute: First, words and phrases shall be taken in their plain or ordinary and usual sense, but technical words and phrases having a peculiar and appropriate meaning in law shall be understood according to their technical import."

With these rules in mind, we believe that the phraseology employed in Section 4890, R. S. Mo. 1939 referring to "the last census of the United States" must be given the meaning of "last Federal decennial census of the United States." The regular decennial census is the only one that is ordinarily and commonly referred to by the use of the words "United States census." The so-called "pretest census" is but a creature of administrative procedure. Its prime purpose is to test the technique to be used at the time the official decennial census is made. We do not believe that such a census was within the contemplation of the General Assembly at the time Section 4890, R. S. Mo. 1939 was adopted.

We are further strengthened in this view by reason of Section 654, R. S. Mo. 1939 which reads as follows:

"All representation or other matters heretofore or now based on the state census shall be based on the <u>United States census of this state</u>."

The emphasized portion of the statute evinces an intention on the part of the General Assembly that matters which are to be determined by a population count of the inhabitants of any particular portion of the state are to be determined by the United State official census of the state as a whole.

In other words, it seems clear that by the adoption of this all inclusive statute it has been intended to refer all matters of population to the regular Federal decennial census.

CONCLUSION .

In the premises we are of the opinion that the phrase, "last census of the United States" as used in Section 4890, R. S. Mo. 1939 refers to the regular Federal decennial census.

We are further of the opinion that no permit for the sale of intoxicating liquor by the drink at retail may be issued within a city until the population of such city shall have been determined to be twenty thousand or more according to such last Federal decennial census.

Respectfully submitted,

APPROVED:

WILL F. BERRY, JR. Assistant Attorney General

J. E. TAYLOR Attorney General

WFB:few

TAXATION _

SALES TAX:

Federal Excise Taxes and freight charges not deductible from "contract price" in levying tax on motor vehicles under Sales Tax Act.

May 5, 1949



Honorable William H. Burden Missouri Senate Capitol Building (Room 319) Jefferson City, Missouri

Dear Senator Burden:

This is in answer to your recent letter requesting an opinion from this department and reading as follows:

"I have received several inquiries from people in my district as to whether or not our local auto license bureau, in assessing the sales tax on new automobiles, is justified in including the freight and the Federal Excise Tax as a part of the cost in determining the amount of tax. They have requested me to attempt to obtain a ruling from your department on the legality of the above procedure."

In disposing of your inquiry we look to the latest legislative declaration on this subject which is to be found in House Bill No. 258, Laws of Missouri 1947, Vol. II, page 431. This recent Act is now to be found embraced in Sections 11411, 11412, 11416, 11417 and 11420, Mo., R.S.A. House Bill No. 258, supra, repealed Sections 11411 and 11416 contained in House Bill No. 274 enacted by the 64th General Assembly (Laws of Missouri 1947, Vol. I, page 553) and Sections 11412, 11417 and 11420 contained in House Bill No. 652 (Laws of Missouri 1945, page 1865) enacted by the 63rd General Assembly relating to sales tax and known as the Sales Tax Act.

Having disclosed the method by which the 64th General Assembly, by its enactment of House Bill No. 258, supra, repealed and re-enacted Sections 11411, 11412, 11416, 11417 and 11420 of the Sales Tax Act (Article 24, Chapter 74, Mo. R.S.A.) our discussion must now turn to the purpose for which House Bill No. 258, supra, was enacted. The expressed purpose of the Act may be discovered by reference to the title of the Act which reads as follows:

"AN ACT to repeal Sections 11411 and 11416 contained in House Bill No. 274 enacted by

the 64th General Assembly and Sections 11412, 11417 and 11420 contained in House Bill No. 652 enacted by the 63rd General Assembly, relating to sales tax and known as the Sales Tax Act and to enact five new sections in lieu thereof relating to the same subject matter to be known as Sections 11411, 11412, 11416, 11417 and 11420, respectively, and to transfer the collection of sales tax on motor vehicles from vendors thereof to the Director of Revenue and providing procedures therefor, to levy an additional tax for the use of the highways of the state by motor vehicles, and to provide exemptions therefrom."

From a reading of the Act in question, as well as by reference to its title, it is readily discovered that the legislature, in its enactment of House Bill No. 258, supra, sought only to amend the general Sales Tax Act by selecting motor. vehicles out of the great wealth of tangible personal property subject to the Sales Tax Act, and provide a more feasible plan for the imposition, collection and reporting of the tax of general application under the Sales Tax Act, in its relation to motor vehicles. In construing House Bill No. 258, supra, we are not dealing with an Act that is capable of standing alone, but it must be viewed as a component part of the Act which it amends. Only by this method are we able to construe the Sales Tax Act as a whole and by so doing arrive at the legislative intent, both expressed and implied in the language used. The amending sections are so drawn as to negative any contention that they constitute a law separate and distinct from the general Sales Tax Act. Such sections are written so as to harmonize with the over-all scheme of the Sales Tax Act. This conclusion is tenable as we review the nature of the amendments, their scope and affect in relation to the Sales Tax Act. We next consider the amendments.

Section 11411 of House Bill No. 258, supra, changes the wording of Section 11411 of House Bill No. 274, Laws of Missouri 1947, Vol. I, page 553, by adding the following proviso:

"" "Provided, however, that the collection of the tax imposed by this article on motor vehicles shall be made as provided for in Section 11412 of this Act " "". The quoted proviso from the amended Section 11411 of House Bill No. 258, operates as an exception to the general rules laid down in the section pertaining to the general imposition and collection of the tax imposed by the Sales Tax Act, and directs our attention to the following amended Section 11412, of House Bill No. 258, where we are to find the general rule stated regarding (a) penalties imposed for wilful and intentional refusal to pay the tax imposed by the Sales Tax Act, (b) the method of acquiring a certificate of title to a new or used motor vehicle subject to the tax imposed by the Sales Tax Act, (c) the legislative denomination of the tax imposed by the Sales Tax Act on motor vehicles as a use tax, and (d) exemption clauses. The importance of this amended section to the inquiry at hand makes it advisable to quote the section in its entirety, as follows:

"Section 11412. SALES TAX ON MOTOR VEHICLES. (a) It shall be the duty of every person
making any purchase or receiving any service
upon which a tax is imposed by this article
to pay the amount of such tax to the person
making such sale or rendering such service;
any person who shall wilfully and intentionally refuse to pay such tax shall be guilty
of a misdemeanor: Provided, however, that
the provisions of this section shall not apply to any person making any purchase or
sale of a motor vehicle subject to sales tax
as provided by the Missouri Sales Tax Act.

(b) That at the time the owner of any new or used motor vehicle which was acquired in a transaction subject to sales tax under the Missouri Sales Tax Act makes application to the Director of Revenue for an official certificate of title and the registration of said automobile as otherwise provided by law, he shall present to the Director of Revenue evidence satisfactory to said Director of Revenue showing the purchase price paid by or charged to the applicant in the acquisition of said motor vehicle, or that no sales tax was incurred in its acquisition, and if sales tax was incurred in such acquisition, such applicant shall pay or cause to be paid to the Director of Revenue the sales tax provided by the Missouri Sales Tax Act in addi-

tion to the registration fees now or hereafter required according to law, and the Director of Revenue shall not issue a certificate of title for any new or used motor vehicle subject to sales tax as provided in said Missouri Sales Tax Act until the tax levied for the sale of the same under said Act has been paid as herein provided. As used above, the term 'purchase price' shall mean the total amount of the contract price agreed upon between the seller and the applicant in the acquisition of said motor vehicle, regardless of the medium of payment therefor. In the event that the purchase price is unknown or undisclosed, or that the evidence thereof is not satisfactory to the Director of Revenue, the same shall be fixed by appraisement by the Director. The Director of Revenue shall endorse upon the official certificate of title issued by him upon such application an entry showing that such sales tax has been paid or that the vehicle represented by said certificate is exempt from sales tax and state the ground for such exemption.

(c) In addition to all other taxes now or hereafter levied and imposed upon every person for the privilege of using the highways of this state, there is hereby levied and imposed a tax equivalent to two percent of the purchase price, as defined in subsection (b) hereof, which is paid or charged on new and used motor vehicles purchased or acquired for use on the highways of this state which are required to be registered under the laws of the State of Missouri. That at the time the owner of any such motor vehicle makes application to the Director of Revenue for an official certificate of title and the registration of the same as otherwise provided by law, he shall present to the Director of Revenue evidence satisfactory to said Director showing the purchase price paid by or charged to the applicant in the acquisition of said motor vehicle, or that said motor vehicle is not subject to the tax herein

provided and, if said motor vehicle is subject to the tax herein provided such applicant shall pay or cause to be paid to the Director of Revenue the tax provided herein. In the event that the purchase price is unknown or undisclosed or that the evidence thereof is not satisfactory to the Director of Revenue, the same shall be fixed by appraisement by the Director. No certificate of title shall be issued for such motor vehicle unless said tax for the privilege of using the highways of this state has been

paid.

(d) The tax imposed by this section shall not apply to motor vehicles on account of which the sales tax provided by this act shall have been paid, nor to motor vehicles brought into this state by a person moving into Missouri from another state who shall have registered said motor vehicle in said other state at least ninety days prior to the time it is registered in this state, nor to motor vehicles acquired by registered dealers for resale, nor to motor vehicles purchased, owned or used by any religious, charitable or eleemosynary institution for use in the conduct of any regular religious, charitable or eleemosynary functions and activities, nor to motor vehicles owned and used by religious organizations in transferring pupils to and from schools supported by such organization, nor where the motor vehicle has been acquired by the applicant for a certificate of title therefor by gift or under a will or by inheritance, and the tax hereby imposed has been paid by the donor or decedent, nor to a motor vehicle, for which a certificate of title is sought by the applicant, which was acquired by him within the State of Missouri in an isolated or occasional sale as defined by subsection (c) of Section 11407 of the Missouri Sales Tax Act, nor to any motor vehicle owned or used by the State of Missouri or any political subdivision thereof, nor by any educational institution

supported by public funds, nor to farm tractors or motor vehicles having a seating capacity of ten passengers or more."

Section 11412, just quoted, supra, amended Section 11412 of House Bill No. 652, Laws of Missouri 1945, page 1865, by reenacting the last mentioned section in its entirety, with an added proviso, as subparagraph (a) of House Bill No. 258, supra, to be followed by subparagraphs (b), (c) and (d). The result of the action of the legislature in repealing and re-enacting, with an added proviso, Section 11412 of House Bill No. 652, Laws of Missouri 1945, page 1865, as subparagraph (a) of the present Section 11412, merely carried over into the present law a penal clause of the Sales Tax Act, and the added proviso now contained in subparagraph (a) of the present Section 11412 must be read in connection with subparagraphs (b), (c) and (d) of such section, not in an attempt to create a class of persons, purchasers of motor vehicles, as exempt from paying the tax imposed, but as exempting them from the penal clause only when they follow the procedure and meet the requirements outlined in subparagraphs (b), (c) and (d) of the present section.

When the legislature so drafted the present law as to make the tax on motor vehicles levied under the Sales Tax Act payable to the Director of Revenue, such amendment necessarily required that a proviso be placed in the Sales Tax Act exempting from the penal clause contained in subparagraph (a) of the present Section 11412, persons making purchases of motor vehicles subject to the Sales Tax Act. In no other way could the purchasers of motor vehicles liable for the payment of the tax under the Sales Tax Act be relieved of the responsibility attaching to all purchasers of tangible personal property to pay to the seller the tax due on such property under the penal clause contained in subparagraph (a) of the present Section 11412. The wisdom of setting up the present Section 11412 in its existing form may well be challenged, but we do feel that when the section is read in the light of other germane provisions of the Sales Tax Act, it becomes feasible in operation and serves the purpose for which it was enacted by the legislature.

Section 11416 of House Bill No. 258, Laws of Missouri 1947, Vol II, page 431, amended the same numbered section found in House Bill No. 274, Laws of Missouri 1947, page 553. Sections 11417 and 11420 of House Bill No. 258, Laws of Missouri 1947, Vol. II, page 431, amended corresponding section numbers of House Bill No. 652, Laws of Missouri 1945, page 1865.

Such sections of the Sales Tax Act just referred to, did no more than place an exemption clause in said sections insofar as such sections had application to sales, services and transactions provided for in subparagraph (b) of the present Section 11412 of House Bill No. 258, supra.

Having devoted a considerable portion of this opinion to a review of House Bill No. 258, and its structure, we now consider the main inquiry made relative to the inclusion of Federal Excise Tax and freight charges in the purchase price of an automobile as a base on which to compute the tax payable to the Director of Revenue of Missouri by a non-exempt purchaser of a motor vehicle. Subparagraph (b) of Section 11412, House Bill No. 258, supra, provides that the tax is to have as its base the "purchase price paid by or charged to" the purchaser of the motor vehicle. Such section defines purchase price in the following language:

"* "As used above, the term 'purchase price' shall mean the total amount of the contract price agreed upon between the seller and the applicant in the acquisition of said motor vehicle, regardless of the medium of payment therefor. " " "

In defining "purchase price" in Section 11412, supra, the legislature has defined a term used in the Act and such definition is not to be enlarged upon in order to create an exception to the rule stated. We must accept the language as written and its simple clarity is not to be disputed in this instance.

Most Federal Excise Taxes are levied on the producer or manufacturer and are not required, by law, to be passed on to the consumer. Section 3403, Title 26, U.S.C.A. provides for a manufacturer's excise tax, on automobiles and accessories therefor, equivalent to stated percentages of the price for which the automobiles, and accessories therefor, are sold.

In the case of People v. Werner (1936) 364 Ill., 594, 5 N.E. (2nd) 238, a writ of error was brought in the Supreme Court of Illinois to determine whether the Retailers' Occupation Tax Act of Illinois, which imposed a three per cent tax on gross receipts of sales of tangible personal property at retail, was, in its operation unconstitutional because as applied to retail sales of gasoline it was allegedly a tax upon a tax. One of the

contentions of the gasoline retailer in that case was that, as a gasoline retailer, he had paid a federal excise tax on the gasoline and that it was improper for the State of Illinois to levy the Retailers' Occupation Tax on his gross receipts of sales of gasoline to his customers. The Court held that the retailer's contention was without substance in law or fact, and spoke as follows:

"The claim that Werner, as a gasoline retailer. has paid a federal excise tax of one cent per gallon since January, 1934, is likewise without substance in law or fact. Section 617 of the internal revenue laws (26 U.S.C.A. Secs. 3601-3629, see 26 U.S.C.A. Sec. 1420 et. seq. note) levies a federal excise tax of one cent per gallon on the producer or importer of gasoline and prescribes for his registration and the conditions under which he shall furnish bonds, make returns, and pay the tax to the federal collector of the district. No excise tax is imposed upon or paid by the retailer of gaso-line. It may be true that the federal excise tax upon gasoline which is paid by the producer or importer is, upon its sale to the retailer, added to the cost of the product as a separate charge, in the same manner as transportation, delivery, insurance, or other charges are added. The itemization of these separate charges, or any of them, in the invoices sent by the producer or importer to the retailer, does not change the fact that the producer or importer has paid the tax to the federal government and has thereby, in effect, raised the cost of the gasoline to the retailer. The federal excise tax has therefore made the gasoline cost one cent per gallon more to the retailer, just as import or other taxes levied by the federal government are added to the price of cigars, cigarettes, clothing, or automobiles sold by producers or importers to retailers. The retailer, whether of tobacco, gasoline, clothing or automobiles, has no duty or burden of collecting or paying over to the federal government any manufacturer's or importer's excise taxes-they have already been paid before he gets the

article, and they are as much a part of the cost to him as are freight, express, insurance, or other charges which enter into and increase the cost of such articles. When either the tobacco, the gasoline, the clothing, or the automobile is sold, the retailer recoups himself against loss when he gets at least as much as he had paid for the article, regardless of how much federal or other taxes may have been paid at different stages by the processors, importers, or manufacturers who preceded him in its ownership. * * **

The reasoning contained in the case of People v. Werner, just cited, may well be applied to the fact situation at hand, and the conclusion hereinafter made is based on the well reasoned opinion of the Illinois Supreme Court.

CONCLUSION.

It is the opinion of this department that the term "purchase price" as used in Section 11412 of House Bill No. 258, Laws of Missouri 1947, Vol. II, page 431, is the contract price agreed upon between the seller and the buyer of a motor vehicle, and that the Director of Revenue of Missouri must use such price as a base on which to compute the tax payable by the buyer under the Sales Tax Act of Missouri, without deducting from such base figure any freight charges or Federal Excise Taxes which may have entered into such contract price.

Respectfully submitted,

APPROVED:

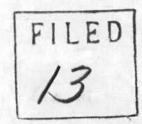
JULIAN L. O'MALLEY Assistant Attorney General

J. E. TAYLOR Attorney General

льо'м:р

July 7, 1949

Mr. W. H. Burke Assistant Supervisor Sales Tax Unit Department of Revenue Jefferson City, Missouri



Dear Sir:

We have received your request for an opinion of this department, which request is as follows:

"Mr. C. F. Keebaugh in St. Louis, Missouri, is manufacturing agent for a Poster Company of Cincinnati, Ohio, who manufacture the big paper sheets that are used on bill-boards for advertising purposes.

"A concern in St. Louis contracts with an Advertising Agency for a certain amount of billboard space for a definite period of time, then the Advertising Agency makes up a design that they desire to use for their Client on these billboards and have Mr. Keebaugh send the order to Cincinnati and the posters are shipped to a third party, the General Outdoor Advertising Company of St. Louis, who warehouse them for the Advertising Agency and later apply them to the billboards specified by the Advertising Agency. In the mean time the Advertising Agency wi'l lease from various owners certain billboards already erected or space on which the Advertising Agency will erect a board when it is determined just what boards are favorable for their Client, they will lease these boards to their client for a specific period of time and then order the General Outdoor Advertising Company to paste these paper sheets on the boards in question.

"Since the advertiser has a lease so that no other party can use these particular boards during the period of the lease, is this rental taxable and is the purchase of the sheets taxable?"

The determination of sales tax liability in a situation such as this is largely a factual matter, the fundamental legal problems involved being of relatively simple solution when the complete facts are at hand. On the basis of the facts which you have presented we cannot give you a categorical answer to your question concerning tax liability, but we will endeavor to point out what we consider the pertinent matters which must be ascertained by you in order to properly assess sales tax liability.

As for the question of liability for tax upon the billboard rental, the sales tax is imposed upon "every retail sale in this State of tangible personal property." Section 11408(a), Mo. R.S.A. Under Section 11407(d), Mo. R.S.A., in case of lease or rental of tangible personal property, when the right to continuous possession or use of the property is granted to the lessee and such transfer of possession would be taxable if an outright sale were made, the transaction is made taxable "as if outright sale were made and considered as a sale of such article and the tax shall be computed and paid by the lessee upon the rentals paid."

Rule 78, adopted under the Sales Tax Act, contains the following provision:

"When signs are sold under lease or rental contract and where the right to continuous possession and use is given to the lessee, rental charges are subject to sales tax.

This rule seems to cover the situation about which you have inquired, and therefore the matter which remains is determination of just who is the lessee and liable for the tax.

You state that the advertising agency first leases the bill-boards from the owners and then leases them to the client. If such is the case, the liability would be upon the client inasmuch as the sales tax is upon "sales at retail" for use by the purchaser and not for resale (Section 11407(g), Mo. R.S.A.), and the same rule would apply in case of a lease. If the original lessee

did not obtain the billboards for his own use but for the purpose of re-leasing them to its client, the final taxable transaction would be that between the advertising agency and its client.

Of course, the transactions may vary. In some cases the advertising agency may simply contract with a client to furnish a certain amount of billboard space, with the client never directly leasing the space in question. In such case the taxable transaction would likely be that between the advertising agency and the owner of the billboard, although the liability might be affected by the contract between the advertising agency and client. As we pointed out above, the facts of each situation would have to be known in order to properly determine tax liability.

As for the question of tax liability upon the sale of the poster sheets, Section 11409, Mo. R.S.A., provides, in part, as follows:

"There is hereby specifically exempted from the provisions of this article and from the computation of the tax levied, assessed or payable under this article such retail sales as may be made in commerce between this state and any other state of the United States, * * *"

In the case of American Bridge Co. v. Smith, 352 Mo. 616, 179 S.W. (2d) 12, 157 A.L.R. 798, the Supreme Court held that this provision exempted from the sales tax any transaction in interstate commerce, although the transaction might be such as the State of Missouri might tax without infringing the Commerce Clause of the Federal Constitution. Under the situation which you have presented, the transaction is one in interstate commerce, the property being processed in and shipped from Cincinnati, Ohio, to this state. Under the holding of American Bridge Company v. Smith, that is such transaction as is exempt under Section 11409, Mo. R.S.A.

Conclusion.

Therefore, it is the opinion of this department that the rental paid upon the lease of billboards for advertising purposes is subject to the Missouri sales tax, liability for the

Mr. W. H. Burke

tax depending upon the facts of the particular transaction, the ultimate lessee being the person liable for the tax.

We are further of the opinion that the sale of billboard sheets, purchased through a manufacturing agent in St. Louis who forwards the order to Cincinnati, where the posters are prepared and shipped to St. Louis to an agent of the purchaser, is a sale in commerce between this state and another state and, under Section 11409, Mo. R.S.A., is not subject to sales tax.

Respectfully submitted,

ROBERT R. WELBORN
Assistant Attorney General

APPROVED:

J. E. TAYLOR Attorney General

RRW:ml

SALES TAX: Liability for tax upon advertising posters to be shipped outside state depends upon time of passage of title.

July 12, 1949

Mr. W. H. Burke Assistant Supervisor Sales Tax Unit Department of Revenue Jefferson City, Missouri



Dear Sir:

We have received your request for an opinion of this department, which request is as follows:

"We have a manufacturer of paper posters at St. Louis, Missouri, who will print a large amount of posters for concerns outside the State of Missouri. He will warehouse the posters and when the posters are put in the warehouse, he sends an invoice to his customer and collects his charges. Is this acceptance of the merchandise in Missouri therefore subject to Missouri Sales Tax?"

In your opinion request you give us no information relative to the ultimate destination of the goods in question. Presumably, they are intended for ultimate shipment and use outside Missouri. Otherwise, there would appear to be no question of sales tax liability. Upon the basis of this assumption the fundamental problem is determination of whether or not title to the goods in question passed upon their completion and payment of the purchase price. If title did not pass until actual delivery to the purchaser in another state, the transaction would be such as would be exempt under Section 11409, Mo. R.S.A., exempting retail sales made in commerce between this state and any other state, and the holding of the Supreme Court in the case of American Bridge Company v. Smith, 352 Mo. 616, 179 S.W. (2d) 12.

If the taxable event occurred upon payment of the purchase price and the goods were thereafter warehoused in this state as

property of the purchaser to await the pleasure of the purchaser as to their ultimate destination, transaction would not, we feel, fall within Section 11409, supra, and would be subject to tax. The rule in this regard is stated in 11 Am. Jur., Commerce, Section 70, page 65, as follows:

" * * * substantial authority establishes the rule that a commodity does not become the subject of interstate transportation so as to preclude taxation by the state merely by reason of the fact that the owner intends its exportation. Not only is a mere intention to export an article or commodity insufficient of itself to exempt it from state taxation, but the rule appears to be that a movement merely in preparation for export -- in other words, a mere transfer of the property to a depot or other place within a state from which the transportation or journey to another state is to begin at a convenient time -- is not a part of that transportation so as to exempt the property, because of such transfer or movement, from state taxation. The beginning of the transit which constitutes interstate commerce is the point of time that an article is started on its ultimate passage. * * *"

In the absence of complete information concerning details of the transaction, just when passage of title could have occurred is difficult to say. The principal factor upon which the passage of title between a seller and the purchaser depends is the intention of the parties, to be determined according to the terms of the contract, the conduct of the parties, usages of trade, and the circumstances surrounding the particular transaction. 46 Am. Jur., Sales, Section 413, page 585. The only information submitted regarding any of these matters is the fact that payment of the purchase price is made upon completion of "Although the actual payment of the price or part the posters. thereof by the buyer in case of a sale of specified or identified chattels is a circumstance tending to show that it is the intention of the parties that the title pass, this circumstance is not controlling." 46 Am. Jur., Sales, Section 449, page 614. Consequently, we cannot determine the question of passage of title merely on the basis of information regarding payment.

"While actual delivery is of the greatest importance in determining whether title to goods has passed, there may be a constructive delivery under which title may pass, if such is the intention of the parties." 46 Am. Jur., Sales, Section 434, page 603. Some circumstances which would tend to show in this case whether or not such delivery had occurred as would evince passage of title upon the goods being placed in the warehouse are ownership of the warehouse and the question of at whose expense the warehousing was done. The contract of sale might contain an express provision in regard to these matters. If the seller was required by the contract to deliver the goods to the purchaser at some specified place at the seller's expense and merely hold them in his own warehouse pending notice from the purchaser, that would indicate no passage of title would occur until delivery at such specified place. If the goods were placed in a warehouse owned by the seller and no charge made to the buyer for their storage, there might well be considered to be no such constructive delivery as would evince passage of title. On the other hand, even if the goods were placed in the seller's warehouse, if the buyer paid storage charges, that fact, together with the payment of the purchase price, would be strong evidence of delivery sufficient to indicate passage of title. If the warehouse is owned by the buyer, the delivery would undoubtedly be regarded as actual delivery sufficient to pass title. If the warehouse is owned by a third person and warehousing charges are paid by the buyer. delivery to the warehouse would undoubtedly be considered sufficient to result in passage of title.

These matters, and any other facts which might shed light upon the agreement and the intention of the parties, would have to be ascertained in order to determine the question of whether or not this transaction is subject to sales tax. Since we do not have these facts, we can only point out to you what the problems are.

Conclusion.

Therefore, it is the opinion of this department that where a manufacturer of paper posters in this state prints posters for concerns outside Missouri, the ultimate destination of the posters being outside the state, and upon the completion of the posters Mr. W. H. Burke

collects his charges and warehouses the finished products, whether or not the transaction is subject to the Missouri sales tax depends upon the time of passage of title. If title passes upon completion of the posters and payment of the purchase price, the transaction is taxable. If title does not pass until the goods reach their ultimate destination outside this state, the transaction is exempt under Section 11409, Mo. R.S.A. When title passes is a matter to be determined by the intention of the parties, as shown by the terms of the contract, the conduct of the parties, usages of trade, and the circumstances surrounding the transaction.

Respectfully submitted,

ROBERT R. WELBORN Assistant Attorney General

APPROVED:

J. E. TAYLOR Attorney General

RRW:ml

OFFICERS) Sheriffs charged with duty of arresting persons at request of parole or probation officer.

OFFICERS) Sheriffs are not entitled to additional compensation for duties performed at request of parole or probation officers.

September 22, 1949

Honorable Donald W. Bunker Executive Secretary State Board of Probation and Parole Jefferson City, Missouri

F



Dear Sir:

Reference is made to your request of recent date for an official opinion of this Department, reading as follows:

"The members of the Board of Probation and Parole should appreciate an opinion from you relative to Section 44, Laws of Missouri 1945, page 737, which reads in part: 'Upon request of the Board or any parole or probation officer, all peace officers of this state are authorized and required to make arrests and to hold a person so arrested to the order of any parole or probation officer.'

"Can the sheriff refuse to act; and if he does act, how will he obtain his compensation for his expenses and service?"

The statutes referred to us is part of an act found Laws of Missouri, 1945, page 723. Section 44 of the act reads as follows:

"Under orders of the board, parole and probation officers shall give supervision to persons on parole and such assistance in treatment and rehabilitation and perform such other duties as may be prescribed by the board. The board and probation and parole officers shall have jurisdiction coextensive with the boundaries of this state and may make arrests of persons on parole anywhere in the state in the course of their duties under this act. Upon request of the board or of any parole or probation officer, all peace officers of this state are authorized and required to make arrests and to hold a person so arrested to the

order of any parole or probation officer."

(Underscoring ours.)

From the foregoing you will note that sheriffs and all other peace officers of the state are required to arrest and hold persons upon direction to do so by a parole or probation officer of the Board of Probation and Parole. The language of this statute is mandatory and admits of no other construction than that such sheriffs and peace officers must comply therewith. The failure of an officer to comply with such statutes, absent a reasonable excuse for such failure, amounts to neglect of official duty. Upon proper proceedings and if the facts in a particular case warrant the exercise of such extraordinary remedy, such officer could be removed from office.

Further, with respect to the second question you have proposed, we direct your attention to four acts found Laws of Missouri, 1945, page 574, page 1570, page 1562, and page 1547, respectively, relating to the compensation of sheriffs in counties of the first, second, third and fourth classes. These acts were passed pursuant to the constitutional provision found as Section 13, Article VI of the Constitution, reading as follows:

"All state and county officers, except constables and justices of the peace, charged with the investigation, arrest, prosecution, custody, care, feeding, commitment, or transportation of persons accused of or convicted of a criminal offense shall be compensated for their official services only by salaries, and any fees and charges collected by any such officers in such cases shall be paid into the general revenue fund entitled to receive the same, as provided by law. Any fees earned by any such officers in civil matters may be retained by them as provided by law."

Your attention is also directed to the case of Nodaway County v. Kidder, 129 S.W. (2nd) 857, wherein the court has said at 1.c. 860:

"The general rule is that the rendition of services by a public officer is deemed to be gratuitous, unless a compensation therefor is provided by statute. * * *"

We have examined all of the provisions of the act found Laws of Missouri, 1945, page 723, and do not find that any provision has been made therein for the payment of any fees to sheriffs or other peace officers for the discharge of the duties imposed on them under the provisions of Section 44 of the act. In other words, since provision has been made under the four acts referred to, supra, for the compensation of sheriffs in the various classes of counties for the discharge of their duties in connection with criminal matters, it is our thought that no additional compensation may be paid them for duties imposed by Section 44 of the act found Laws of Missouri, 1945, page 737.

What has been said heretofore disposes of that portion of your second question as relates to compensation for "service". With respect to reimbursement for "expenses", we believe that other provisions of the acts mentioned, supra, relating to the compensation of sheriffs in the various classes of counties to be pertinent.

The act found Laws of Missouri, 1945, page 574, relates to sheriffs in counties of the first class. We do not find that any provision is contained therein for reimbursing such sheriffs for expenses incurred in the discharge of their official duties.

The act found Laws of Missouri, 1945, page 1569, relates to the compensation of sheriffs in counties of the second class. We find that under sections 7 and 9 thereof provision has been made for reimbursement of the sheriff of such counties at the rate of 5¢ per mile actually and necessarily traveled in the performance of their official duties, and for reimbursement for actual and necessary traveling expenses in addition to such mileage.

The acts found Laws of Missouri, 1945, page 1562, and page 1547 relate to the compensation of sheriffs in counties of the third and fourth class respectively. In each of these acts we find that provision has been made for reimbursement of such officers for actual expenses incurred in the discharge of their official duties in an amount not to exceed 5¢ per mile.

CONCLUSION

In the premises we are of the opinion that the duties imposed upon sheriffs by the provisions of Section 44 of an act found Laws of Missouri, 1945, page 737, are mandatory in nature, and that refusal by such officers to comply with the provisions of such acts amounts to neglect of duty.

We are further of the opinion that in the event sheriffs

discharge the duties imposed under the provisions of Section 44 of the act found Laws of Missouri, 1945, page 737, they may not be further compensated for such services, as the entire compensation of such officers for duties in connection with criminal matters is provided for under four acts found Laws of Missouri, 1945, page 574, page 1570, page 1562, and page 1547, dependent upon the classification of the county in which such person is the sheriff.

We are further of the opinion that such officers may be reimbursed for travel expenses and mileage to the extent authorized under the provisions of the acts relating to sheriffs in counties of the various classes, being acts found Laws of Missouri, 1945, page 574, page 1569, page 1562 and page 1547, relating to counties of the first, second, third and fourth classes respectively.

Respectfully submitted,

WILL F. BERRY, JR. Assistant Attorney General

APPROVED:

J. E. TAYLOR Attorney General SALES TAX

A sale of goods in one state for transpor-INTERSTATE COMMERCE: tation to another state is not interstate commerce where the agreement itself is to be completed and carried out wholly within the borders of a state; and such transaction is therefore subject to the Missouri Sales Tax Act.

December 16, 1949

12/21/49

Mr. W. H. Burke Department of Revenue Jefferson City, Missouri



Dear Mr. Burke:

This is in reply to your request for an opinion which is as follows:

"The GMC Truck & Coach Division of General Motors sell merchandise to the Missouri Pacific Transportation Company destination points outside the State of Missouri. They deliver these shipments from the St. Louis Warehouse to the Missouri Pacific Railroad Company, the owner of the Missouri Pacific Transportation Company, who deadhead the material to the proper destination.

"Should we collect sales tax on these shipments or are they Interstate?"

On September 20, 1949 you further informed this department that the orders for the truck and bus supplies herein involved were mailed to the General Motors Company in St. Louis from out-ofstate offices of the Missouri Pacific Transportation Company with the information that the said supplies be delivered to the depot of the Missouri Pacific Railroad Company in St. Louis, Missouri.

The facts as recited in your opinion request and the supplemental information supplied this department by you involve a sale of goods in Missouri by the General Motors Corporation to a branch of the Missouri Pacific Transportation Company located outside the State of Missouri. The contracts of sale in these transactions provided for the delivery of the purchased property to a common carrier in St. Louis, Missouri, by the General Motors Corporation, which carrier would accept the goods for delivery to the Missouri Pacific Transportation Company and assess the freight charges to the said Missouri Pacific Transportation Company.

Your opinion request presents the following question:

Mr. W. H. Burke

Are the above des
interstate comments
Sales Tax under S

Are the above described purchases and sales transactions in interstate commerce, and, therefore exempt from the Missouri Sales Tax under Section 11409 Mo. R. S. Ann., 1939?

A general definition of interstate commerce is stated in the case of Addyston Pipe & Steel Company v. U. S., 175, U. S. 211 as follows:

"Interstate commerce consists of intercourse and traffic between the citizens and inhabitants of different states, and includes not only the transportation of persons and property * * * * *, but also the purchase, sale and exchange of commodities."

It will be noticed that the foregoing general definition of interstate commerce does not include all intercourse and traffic between citizens and inhabitants of different states. It would therefore seem to follow that there may be some instances of intercourse and traffic between citizens and residents of different states which would not be transactions in interstate commerce. One such instant would be a contract of sale between citizens of different states where the agreement itself were completed and carried out wholly within one state. The rule in this regard is stated in 11 Am. Jur., Commerce, Section 10, page 38, as follows:

"* * * * A contract of sale between citizens of different states is not a subject of interstate commerce merely because it was negotiated between citizens of different states or by the agent of a company in another state where the agreement itself is to be completed and carried out wholly within the borders of a state. * * * * *

In the particular transactions herein involved the orders were accepted, filled and delivered to the carrier in St. Louis, Missouri. The completion of these acts constituted a complete performance of the contract of sale. Inasmuch as the contract of sale was completed and entirely carried out in the State of Missouri it would seem to follow that such transaction was intrastate and therefore subject to the Missouri Sales Tax.

A rule which lends support to holding the transactions herein involved as being subject to the Missouri Sales Tax is stated in 11 Am. Jur., Commerce, Section 70, page 66 as follows:

"The beginning of the transit which constitutes interstate commerce is the point of time that an

Hon. W. H. Burke

article is started on its ultimate passage.

It will be noticed that the above quoted rule provides that the interstate character of transactions of the nature as herein involved does not commence until the article is started on its ultimate passage. This interpretation of the rule was rendered by the court in the case of Illinois Central Railroad Company v. Fuentes et al 236 U. S. 157 in the following manner:

"When freight actually starts in the course of transportation from one State to another it becomes a part of interstate commerce. The essential nature of the movement and not the form of the bill of lading determines the character of the commerce involved. " " "

The above quotation mentions the fact that the nature of the bill of lading is not the controlling factor to be determined in arriving at a conclusion as to whether a particular transaction is interstate or intrastate. The identical qualification is made in regard to the form of contracts and sale. The authorities are in complete agreement in holding that the parties do not have the power to change intrastate transaction into an interstate transaction by the particular form of the contract. The rule in this regard is stated in 11 Am. Jur., Commerce, Section 28, page 29, and in the case of Superior Oil Company v. Mississippi, 280 U. S. 390, page 394, as follows:

"* * " It is not within the power of the parties by the form of their contract to convert what is exclusively a local business, subject to state control, into an interstate commerce business, protected by the commerce clause. " " " "

Applying the above quoted rule to the transactions herein involved it would necessarily follow that the form of the contract of sale, insofar as it retains the title to the articles sold in the vendor, or transfers the title to the said articles to the vendee would have no effect, nor would it be of any material assistance in determining the character of the transaction. The character of the transaction should be determined from the substance of the transaction and not the form of the transaction.

The above quoted rule was applied in the case of Superior Oil

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Company v. Mississippi, 280 U. S. 390 P. 394 wherein the court recognized the sham employed by the parties to a contract of sale and held that the transaction remained an intrastate transaction by expressing its opinion as follows:

"The instrument then provided that the property consigned herein remains the property of said Superior Oil co. until it shall be delivered to the consignee or consignee's agent at the point of destination,' with provisions throwing all risks upon the purchaser. The seller of course paid no freight. The document seems to have had no other use than, as the Supreme Court of Miss. said, to try to convert a domestic transaction into one of interstate commerce."

(Underscoring ours)

This case on page 395 also takes into consideration the proposition that the vendor had knowledge of the vendee's intent to ship the property outside the borders of the state in which the sale was completed and held that such knowledge on the part of the vendor was not sufficient to change the character of the transaction. The court related the following example:

" * * * * If it had bought bait for fishing that it intended to do itself, the purchase would not have been in interstate commerce because the fishing grounds were known by both parties to be beyond the state line. A distinction has been taken between sales made with a view to a certain result and those made simply with indifferent knowledge that the buyer contemplates that result."

To the same effect as the Superior Oil Co. v. Mississippi case and citing such case is the case of Department of Treasury of the State of Indiana et al v. Wood Preserving Corporation, 313 U. S. 67, pages 64 and 65, the court in discussing the transactions of the Wood Preserving Corporation whereby it sold ties to a Railroad Company to be delivered at a point outside the state, made this statement:

"In these transactions respondent through its agent at once accepted from its vendors the ties which the Railroad Company found satisfactory and then and there sold and

delivered these ties to the Railroad Company. These were local transactions, sales and deliveries of particular ties by respondent to the Railroad Company in Indiana. transactions were none the less intrastate activities because the ties thus sold and delivered were forthwith loaded on the railroad cars to go to Ohio for treatment. The contract providing for the treatment called for the treatment of the ties to be delivered by the Railroad Company at the Ohio plant, and the ties bought by the Railroad Co. in Indians. as above stated, were transported and delivered by the Railroad Company to the treatment plant. Respondent (Wood Preserving Corp.) did not pay the freight for that transportation and the circumstance that the billing was in the name of the consignor is not of consequence in the light of facts showing the completed delivery to the Railroad Company in Indiana. (Underscoring ours)

The aforementioned cases are factually similar to the transactions contained in your opinion request inasmuch as in such cases the property sold was to be shipped to points outside the state in which the sale was made, the vendor had knowledge of the vendee's intent to so ship the goods and a gents of the vendee accepted delivery of the goods for and in place of the vendee.

In the present instance the vendee directed the goods be delivered to the Missouri Pacific Railroad for shipment outside the State of Missouri, the charges for such shipment were billed to the Missouri Pacific Transportation Company, thus placing the goods under the control of the Missouri Pacific Transportation Company the instant that the General Motors Corporation delivered the same to the Missouri Pacific Railroad Company, and at the same time the General Motors Corporation completed the entire contract of sale within the borders of the State of Missouri.

CONCLUSION

It is, therefore, the opinion of this department that the sale of bus and truck supplies to the Missouri Pacific Transportation Company

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and delivered to the Missouri Pacific Railroad Company as provided by the contract of sale constituted an intrastate transaction inasmuch as the entire contract of sale was completed within the borders of the State of Missouri and such transaction is not exempt from the payment of the Missouri Sales Tax under Section 11409 Mo. R. S. Ann. 1939.

Respectfully submitted

PHILIP M. SESTRIC Assistant Attorney General

APPROVED:

J. E. TAYLOR
ATTORNEY GENERAL P

PMS:A

CONSERVATION COMMISSION:

FISH AND GAME:

Farmer and his family not entitled to fish without permit in waters on land leased by said farmer but not residing thereon.

March 31, 1949

Filed No. 15

Honorable John M. Cave Prosecuting Attorney Callaway County Fulton, Missouri



Dear Sir:

This will acknowledge receipt of your request for an opinion which reads:

"I hereby request your opinion as to the interpretation of Sections 38 and 39 and the definition of the word FARMER, Wild Life Code of Missouri for 1949, as applied to the following facts:

"A farmer owns a farm in Callaway County, Missouri; he also rents a farm, which contains no residence, and which does not adjoin the farm which he owns at any point; he conducts farming operations on both farms; his son attempts to catch fish in waters upon the rented farm without first obtaining a fishing permit. Is the son guilty of a misdemeanor for fishing upon property rented as a farm under the above circumstances?

Under Section 38 of the Wildlife Code of Missouri, 1949, no one may pursue, take or possess wildlife who does not have in his possession at the time, a fishing permit as provided in said Wildlife Code.

Section 39 of the same Code makes an exception to the foregoing regulation and provides that a farmer as defined in said Code may take, possess and transport wildlife without a fishing permit when done as permitted under said Code and only upon the farm where he resides.

Sections 38 and 39 supra read:

"Sec. 38. Permits required unless otherwise provided.--Wildlife may be pursued, taken, transported, shipped, bought, sold, given away, stored, served, used or possessed only by a person who at the same time has in possession the prescribed permit to do so or who is specifically allowed by this code to do so without permit."

"Sec. 39. Permits: farmer exempted.—A farmer as defined in this code, may take, possess and transport wildlife and may sell rabbits and the products of furbearing animals without permit when done as permitted by this code and only upon the farm where he resides; provided, that a farmer who is under seventeen (17) years of age may also transport and sell without permit, within the county where he resides and in any adjoining county, rabbits and the products of furbearing animals legally taken by him on such farm."

Farmer, as defined in said Code comes under Section 56 of the Code which defines various words and terms as used therein. Farmer is defined therein as follows:

"For the purpose of this code and its application, the following definitions shall govern unless a different meaning is clearly evident from the context, and where one or more synonymous names or words are used, they shall be deemed to be interchangeable:

"FARMER: Any bona fide owner or lessee of lands, or his permanently employed hired hand, or any member of the immediate household of such owner, lessee or employee within the state, who is a citizen of the state and who actually resides upon and operates such land exclusively for agricultural purposes."

There can be no question as to the authority vested in the Conservation Commission under and by virtue of Section 40(a), 45-46, Article IV, Constitution of Missouri, 1945, to make such rules and regulations. (See Marsh v. Bartlett, 343 Mo. 526, 121 S.W. (2nd) 737.)

There are two well established rules of statutory construction which likewise are applicable in construing rules and regulations promulgated and adopted by the Conservation Commission and which might be invoked herein in construing the foregoing regulations and definitions. They are to determine the intent of the legislature in enacting statutes, or as in this case, the intent of the Conservation Commission in adopting such regulations and to construe sections or regulations that are related together, so as to harmonize all, if at all possible, and to then give it that effect. (See Donnelly Garment Company v. Keitel, 193 S.W. (2nd) 577, 354 Mo. 1138; Little River Drainage District v. Lasseter, 29 S.W. (2nd) 716, 325 Mo. 493; Whalen v. Buchanan County, 111 S.W. (2nd) 177, 342 Mo. 33.)

Under Section 38, supra, all persons would be required to take out a permit to fish before taking fish if it were not for some rules making exceptions thereto. One especially pertinent here is rule 39, supra, which excepts therefrom farmers fishing under certain conditions. That exception is that farmers as defined in the Wildlife Code are not required to take out a permit when taking fish in accordance with said Code and only upon the farm where they reside. If it were not for the definition of "farmer" found in the Code, we would conclude under the facts stated in your request, that this farmer's son by fishing out of the waters upon the land leased by his father but not where he resided or lived, would not be violating the law and be subject to misdemeanor under Sections 26 and 27, page 671, Laws of Missouri, 1945.

Attempting to harmonize the foregoing regulations, we find that the definition as adopted by the Conservation Commission for farmer, provides that for the purpose of this Code it shall mean, any bona fide owner or lessee of lands or any member of his immediate household who is a citizen of this state and who actually resides upon and operates such land exclusively for agricultural purposes. The principle part of that definition to be construed is the underscored portion. In other words, if the word "and" should be construed in the disjunctive as "or" then we would in all probability hold that the farmer's son could fish on such leased premises without a fishing permit. However, we are inclined to believe that the word "and" as used herein should be construed in the conjunctive and not as "or" and therefore would mean something in addition thereto. This would require the farmer not only to reside on land owned or leased but also to operate said land for agricultural purposes.

The word "and" as used in the foregoing definition of farmer immediately following the word "resides upon" can only mean in addition thereto and not "or" as used in occasional instances. In McCaull-Webster Elevator Company v. Adams, 167 N.W. 330, 332, 39 N.D. 259, L.R.A., 1918 D 1036, the court in holding the word "and" commonly means in addition thereto said:

"Section 6814 provides that the person claiming a mechanic's lien--

'shall upon compliance with the provisions of this chapter have for his labor done, or materials, fixtures or machinery furnished, a lien upon such building, erection or improvement, and upon the land belonging to such owner on which the same is situated, or to improve which said work was done, or the things furnished (for it), to secure the payment for such labor, * * * material or fixtures.'

"This language contemplates not only a lien upon the building, erection, or improvement, but in addition thereto a lien upon the land where such improvement is situated, or the land to improve which the work was done, or the material furnished. The word "and" in the language above quoted is not used in an explanatory sense, but means and expresses the relation of addition. It is used as a co-ordinate conjunction, and signifies that the person claiming the lien shall have a lien upon the building erection, or improvement, and in addition to a lien upon them he also has a further or additional lien upon the land upon which the improvement is situated, or to improve which said labor was done or material furnished. And in this case not only has the plaintiff who claims the lien a lawful right to claim it against the building or improvement, but in addition thereto and separate and apart therefrom, there is the additional right existing to claim it against the land. (Cases cited.)

Also in Heckthon v. Heckthon, 280 N.W. 79, 81, 284, Mich. 677, the court held that the use of the words "or" and "and" is not to be treated as interchangeable and their distinct meanings should be followed when to do so does not render the sense of the context in which they are used dubiqus, although their strict meaning is more readily departed from than that of other words in statutory enactments. See also Davis v. Buckeye Light and Power Company, 61 N.E. (2nd) 90, 93, 145

Ohio State, 172, wherein the court held that "and" is a word of addition. Likewise in Board of Insurance Commissioners of Texas v. Guardian Life Insurance Company of Texas, 180 S.W. (2nd) 906, 908, 142, Texas 630, wherein the court held that ordinarily the words "and" and "or" are not interchangeable terms, the former being strictly the conjunctive and the latter of a disjunctive nature.

The following text and statutes very well define "reside" and "residence."

54 C.J., Sections 1, 2 and 3, pages 702, 703, defines the word "reside" in the following language:

"In General. An elastic words, often defined and construed by the courts; it is employed in a wide variety of significations, and its meaning has been variously shaded according to the variant conditions of its application, for it is capable of different meanings, and may receive a different meaning according to the connection in which it is found. Specifically, the word is used in two senses, the one, constructive, technical, legal, the other denoting the personal habitual habitation of individuals.

"In the Ordinary Sense. To abide continuously, to sojourn, to dwell permanently or for a length of time; to be present; to be settled as in a home; to have a settled abode for a time, or a dwelling, a home; to have one's dwelling or home; to live in a place; to make an abode for a considerable time; to remain for a long time; to stay. Also to be in official residence; to continue to sit; to exist as an attribute of, inhere.

"In Legal Sense. While the word does not necessarily apply to a legal residence, still it may refer to a person's legal residence and mean an established place of abode, adopted with no present intention of moving elsewhere, being synonymous with 'domicile' in its strict legal sense; and although it means something different from being bodily present, yet in statutes it may be used as meaning actually to occupy, or to live,

or it may be employed as synonymous with being a 'citizen' or an 'inhabitant.'"

Section 4 of the same volume in regard to "Continuity and Permanency" states the following:

"While it is said that the word may signify a temporary abiding, the word in its ordinary sense carries with it the idea of permanence, as well as continuity, and embraces the idea of fixed or permanent residence, to be construed as excluding the mere casual presence of a transient, and implying a permanent abode as contradistinguished from a mere temporary locality of existence. Furthermore it imports a habitation of some degree of permanency, coupled with the home thought."

The word "resided" is defined in Section 7, page 704, as follows:

"Domiciled; lived; the term is said to be interchangeable or synonymous with 'residence.' It may be used, not in the sense of actual pedal presence, but rather of legal residence. It ordinarily refers to a fixed, permanent, and established residence, one's home, as distinguished from a mere stopping place for the transaction of either business or pleasure."

Section 655, R.S. Mo. 1929, gives the following definition of "residence":

"The place where the family of any person shall permanently reside in this state, and the place where any person having no family shall generally lodge, shall be deemed the place of residence of such person or persons respectively;"

Therefore, in view of the foregoing it is quite apparent that in this instance the farmer and his son do not reside upon the land leased and operated by them.

In view of the foregoing definitions of "reside" and "residence" along with the use of the word "and" following

the words "reside upon" as found in the definition of "farmer" in the Code, we are forced to conclude that it was clearly intended by the Conservation Commission in

adopting such regulations and definitions that the farmer's son in this instance, resides upon the farm where the improvements are located, the homestead, and not upon the land leased by his father and connected in no manner with their home.

CONCLUSION

Therefore, it is the opinion of this department that under the facts stated in your request, in view of the foregoing regulations and definitions, that the farmer's son is subject to a misdemeanor for fishing in the waters on the particular land leased by his father prior to securing a fishing permit. However, no offense is committed when he may be fishing upon the farm that he actually is residing upon.

Respectfully submitted,

AUBREY R. HAMMETT, JR. Assistant Attorney General

APPROVED:

J. E. TAYLOR ATTORNEY GENERAL STATE HIGHWAY COMMISSION: Regulations Zimiting loads

required to be filed in office of Secretary of State.

July 17, 1949

1/26/49

Hon. John M. Cave Prosecuting Attorney Callaway County Fulton, Missouri



Dear Sir:

We have received your request for an opinion of this department, which request is as follows:

"Your opinion is hereby requested upon the following set of facts: Pursuant to authority contained in Section 8407, Revised Statutes of Missouri 1939, the State Highway Commission imposed a load limit of not to exceed 400 pounds per inch width of tire upon a state highway in Callaway County, Missouri. In view of Section 31 of Article 1, Section 16 of Article 4, and Section 2 of Schedule, all in the Constitution of Missouri of 1945, is such action of the State High-way Commission in violation of the Constitution of the State of Missouri."

Section 8407, R.S. Mo. 1939, provides:

"Whenever by reason of thawing of frost, or rains, or due to new construction the roads are in a soft condition, the maximum weights on all vehicles mentioned in the preceding section, including trucks, tractors, trailers and semi-trailers and other vehicles therein mentioned may be limited by the state highway commission to such an amount and in such manner as will preserve the road under such conditions; and said commission shall give due

notice thereof by posting notices at convenient and public places along said road or roads or parts thereof which are subject to said regulations and reduction of weights."

Section 8410, R. S. Mo. 1939, provides:

"Any person, firm, corporation, partnership or association violating any of the provisions of sections 8405 to 8409, inclusive, shall be deemed guilty of a misdemeanor and upon conviction thereof, shall be punished by a fine of not less than five dollars (\$5.00) nor more than five hundred dollars (\$500.00) or by imprisonment in a county jail for a term of not exceeding twelve (12) months, or by both such fine and imprisonment."

Section 31 of Article I of the Constitution of Missouri, 1945, to which you refer, provides:

"That no law shall delegate to any commission, bureau, board or other administrative agency authority to make any rule fixing a fine or imprisonment as punishment for its violation."

We are of the opinion that this provision was not intended to apply in the present situation where criminal punishment has been prescribed by the Legislature and is imposed by the courts for violation of a regulation which the Legislature has authorized an administrative agency to make. We feel that the section is intended to apply to a situation in which the administrative agency might make the rule or regulation and also provide by its own rule a fine or imprisonment as punishment for violation of the rule or regulation. This view is supported by the discussion of the provision in the Constitutional Convention when the question was asked of Mr. Marr, Chairman of the Committee presenting the provision: "Well, do you have in mind regulations which they may write under legislative authority where the Legislature itself has provided the penalty?" To this question Mr. Marr replied: "No, this doesn't strike that at all. There the Legislature provides the fine and imprisonment for whatever violation there is." (Tr. Debates of Constitutional Convention, page 1370.)

The second constitutional provision, Section 16 of Article IV of the Constitution of Missouri, 1945, referred to by you, provides:

"All rules and regulations of any board or other administrative agency of the executive department, except those relating to its organization and internal management, shall take effect not less than ten days after the filing thereof in the office of the secretary of state."

The State Highway Commission is a "board or other administrative agency of the executive department." See Section 12 of Article IV of the Constitution of Missouri, 1945.

The constitutional provision to which you have referred makes no exception regarding rules and regulations of the Highway Commission. No exception is made, applying to rules and regulations, notice of which is required to be given in a particular way, by the statutory provision authorizing the promulgation of the regulation. Nor is any exception found in the legislative enactment under this constitutional provision. Section 2 of an act of the 63rd General Assembly, found in Laws of Missouri, 1945, page 1504, provides:

- "(a) Each state agency shall file forthwith in the office of the Secretary of State a certified copy of each rule adopted by it, including all rules now in effect. The Secretary of State shall keep a permanent register of such rules open to public inspection.
- "(b) Each rule hereafter adopted shall become effective ten days after such filing unless a later date is required by statute or specified in the rule."

Section 1(b) of that act defines the term "rule" as follows:

"(b) 'Rule' includes every regulation, standard, or statement of policy or interpretation of general application and future effect, including the amendment or repeal thereof, adopted by an agency, whether with or without prior hearing, to implement or make specific the law enforced or administered by it or to govern its organization or procedure, but does not include regulations concerning only the internal management of

the agency and not directly affecting the legal rights or privileges of, or procedures available to, the public."

A regulation of the State Highway Commission adopted pursuant to Section 8407, supra, would seem to fall within that definition. Inasmuch as there is no exception applicable to such regulation, we are of the opinion that, under the constitutional and statutory provisions above referred to, such regulation would not become effective until ten days after filing in the office of the Secretary of State and that, in the absence of such filing, there would be no basis for any criminal prosecution for its violation.

As for the third constitutional provision to which you have referred, Section 2 of the Schedule, provides, in part:

" * * * All laws inconsistent with this Constitution, unless sooner repealed or amended to conform with this Constitution, shall remain in full force and effect until July 1, 1946."

In view of our interpretation of Section 31 of Article I, as set out above, we are of the opinion that Section 8407, supra, is not inconsistent with that constitutional provision and is not repealed thereby. Nor do we see any conflict between Section 16 of Article IV and Section 8407. Section 16 of Article IV does impose an additional requirement to be met in order to make effective any rule promulgated under Section 8407. However, there is no such inconsistency as would cause the repeal of Section 8407 under Section 2 of the Schedule.

Conclusion.

Therefore, this department is of the opinion that a regulation adopted by the State Highway Commission pursuant to Section 8407, R. S. Mo. 1939, relating to the load limit on state highways, must, in accordance with Section 16 of Article IV of the Constitution of Missouri, 1945, and Section 2 of an act of the 63rd General Assembly, Laws of 1945, page 1504, be filed with the Secretary of State, and that such regulation would become effective ten days after such filing; that no prosecution may be had under Section 8410, R. S. Mo. 1939, for violation of such regulation unless the regulation has been filed in the office of the Secretary of State; that Section 8407, R. S. Mo. 1939, authorizing

the State Highway Commission to promulgate such regulations, is not inconsistent with either Section 31 of Article I or Section 16 of Article IV of the Constitution of Missouri, 1945, and therefore was not repealed by Section 2 of the Schedule to the Constitution of 1945.

Respectfully submitted,

ROBERT R. WELBORN Assistant Attorney General

APPROVED:

J. E. TAYLOR Attorney General

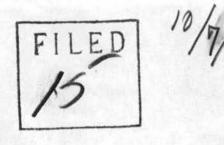
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DIVISION OF WELFARE: PENSIONS:

Legal representative of deceased blind pensioner is entitled to receive payment on pension check previously paid pensioner and to receive payment of accrued pension covering portion of month to pensioner's date of death.

September 26, 1949

Division of Welfare Department of Public Health & Welfare State Office Building Jefferson City, Missouri



Attention: Mr. Proctor N. Carter, Director, Division of Welfare

Gentlemen:

Your letter at hand requesting an opinion of this department, which reads:

"Due to the fact that the present blind pension law does not contain a provision that when a blind pensioner dies having any accrued and unpaid pension the amount thereof shall be paid to the legal representatives of such pensioner, we would appreciate receiving from you an opinion on the following questions:

- "(1) If a blind pensioner dies after a check has been issued to him but before he endorses and cashes it, can a legal representative be appointed to cash such pension check?
- "(2) If a blind pensioner dies during a particular month, can a legal representative of the pensioner claim blind pension benefits for the proportionate part of the month in which death occurred, and, if so, can I legally certify such claim for payment?"

In the law formerly in effect relating to blind pensions, there was a provision that permitted paying an accrued and unpaid pension to the legal representative of a blind pensioner who had died. Thus, Section 9457, Laws of Missouri, 1945, page 1352, provided:

"The state auditor shall supply to all persons appearing upon the blind pension roll, suitable blank forms for monthly requisitions for pensions containing, among other things, a statement that requisitioner is the recipient of the pension personally and that he or she has the free and full use of such pension, and that the same is devoted exclusively to his or her needs, giving present address; and each pensioner shall forward each requisition for pension last accrued to the state auditor who shall draw his warrant in favor of such pensioner upon the state treasurer for any moneys in the treasury available therefor and forward same to pensioner or the legal guardian thereof at such post office address: Provided, that where such pensioner is under legal guardianship, such requisition may be made by the guardian; and in case any pensioner shall die, having any accrued and unpaid pension, the amount thereof shall be paid to the legal representatives of such pensioner; and in case any pensioner should abandon his or her residence in this state, having an accrued and unpaid pension, upon requisition, as herein provided, such unpaid amount shall be forwarded to the address of such pensioner or the legal guardian thereof.

The 64th General Assembly, by the enactment of House Bill No. 334, repealed the above section and enacted another in lieu thereof with the same section number. Thus, Section 9457, Laws of Missouri, 1947, Volume II, page 331, reads as follows:

"The Division of Welfare shall supply to all persons appearing upon the blind pension roll, suitable blank forms for monthly requisitions for pensions containing, among other things, a statement that requisitioner is the recipient of the pension personally and that he or she has the free and full use of such pension, and that the same is devoted exclusively to his or her needs, giving present address; and each pensioner shall forward each requisition for pension last accrued to the Division of Welfare.

Monthly, the Division of Welfare shall prepare a separate roll of persons entitled to receive blind pension, which roll shall be by counties in triplicate showing the name, post office address, amount of pension payable, and such other information as the Division of Welfare may determine to be necessary. One copy of each roll shall be retained as a record by the Division of Welfare. The original roll and one copy properly certified by the Director, shall be delivered to the State Comptroller, who shall certify the same to the State Auditor, who shall audit the same and then issue one warrant for the total amount of all rolls payable to the Division of Welfare, which warrant shall be attached to the copy of the rolls and delivered to the State Treasurer. The State Comptroller shall retain the original rolls as a record of his office. The State Treasurer upon receiving said roll, warrant, and checks prepared by the Division of Welfare for each person on said roll, shall sign said checks and deliver same to the Division of Welfare for delivery to the proper payees."

We apprehend that you have submitted the two questions in your request in view of the fact that the later statute enacted by the 64th General Assembly is silent as to paying accrued and unpaid pensions to the legal representative of a deceased blind pensioner.

In both situations presented in your request, we assume that the pensioner had been duly certified to the Division of Welfare and his name had been placed on the "blind pension roll." Such being the case, we direct your attention to Section 9458 of the act passed by the 64th General Assembly, Laws of Missouri, 1947, Volume II, pages 332, 333, which reads:

"The Division of Welfare shall place the names of all persons certified by it for a pension under this article upon a record to be kept in its office to be known as the 'blind pension roll' which shall contain also the residence, post office address, date upon which the application for pension was filed with the judge of the probate

court or Division of Welfare, and the date
the certificate was received by the Division
of Welfare; and the name of any person
appearing upon the said blind pension roll
shall be prima facie evidence of the right
of such person to the pension herein provided. The custody and control of the
blind pension roll, heretofore kept by
the Comptroller, and the powers and duties
relating thereto, are hereby transferred
to the Division of Welfare."

(Underscoring ours.)

Under the provisions of the above section, the pensioner's name being placed upon the "blind pension roll" is prima facie evidence of his vested right to the pension.

In the first situation you have submitted in question (1), we believe that under the facts the pensioner becoming certified to the Division of Welfare and complying with all the provisions of the statutes acquired a vested right to the particular monthly pension payment. The pension had accrued, and, therefore, constituted a claim against the state. This right of the pensioner was recognized by payment being made to him in the form of a check.

While we are aware of the rule that pensions of this type are considered mere gratuities of the soverign and are subject to being discontinued in the future at the will of the grantor, we are further mindful of the limitation on this rule that where any particular payment under a pension has become due the pensioner has a vested right thereto. Thus, in Volume 40, Am. Jur., Section 24, page 981, it is said:

" * * * And it is a strongly supported rule that where any particular payment under a pension has become due, the pensioner has a vested right thereto. In some of the later decisions this rule has been extended to include instances in which the contingency upon which the pension was to be payable has happened, or where all the conditions have been fulfilled entitling the person in question to a pension. * * * "

Cases holding that where the contingency upon which the pension was payable had happened that the claimant was entitled

to the pension, and in these cases the particular contingency was being placed upon the pension rolls, are Rohe vs. City of Covington, 255 Ky. 164, 73 S.W. (2d) 19, Tyson vs. Board of Trustees of Firemen's Pension Fund, 139 Ky. 256, 129 S.W. 820, Miller vs. Price, 282 Ky. 611, 139 S.W. (2d) 450, Johnson vs. State Employees' Retirement Association, 208 Minn. 111, 292 N.W. 767; and in Passaic Natl. Bank & T. Go. vs. Eelman, 116 N.J.L. 279, 183 Atl. 677, it was held that where installments of a pension have matured, the right of the pensioner to payments vests and constitutes an obligation imposed by the applicable statute.

We further believe that the accrued pension which had been paid to the pensioner by check constituted a valid claim against the state, and, as such, became an asset of the deceased blind pensioner's estate. In this connection, it is said in Volume 33, C.J.S., Section 100, page 1056:

"A claim against the government is an asset of the estate of claimant, and passes to his executor or administrator to be applied in satisfaction of his debts, like any other claim existing in favor of the estate, if it is founded on a contract obligation or other right which the law recognizes, * * * "

A Missouri case which is somewhat analogous to the situation presented in the first question is Ex parte Hickey, Adm'r of Holland, vs. Dallmeyer, 1/14 Mo. 237. In this case a writ of mandamus was sought to command the state treasurer to pay a certain warrant drawn upon him by the state auditor in favor of Holland, while living, for the sum of \$1,900.00, which was appropriated to him as compensation for injuries received upon a railroad while owned by the state. Holland had received the warrant, but before its payment he had died and the treasurer declined to pay it. At l.c. 238, the court said:

" * * After Mr. Holland had received the warrant, and before its payment, he died of his injuries; and the treasurer declines to pay it in consequence of the phraseology of the act, which directs payment 'upon presentation thereof by the said Timothy Holland, or by his agent, with the signature of the said Holland indorsed thereon.' This language is construed as limiting the claim to him personally, and denying it to his personal representatives. We can give it no such construction. The appropriation,

by the first section of the act, is general. The second section only defines the mode of payment, and seems to have been intended to guard against a sale of the claim, and nothing more. The debt was due to Holland at the time of his death, and his personal representative is entitled to receive it. * *

Consequently, in light of the foregoing, we are constrained to the view in answering your first question that the legal representative of the deceased blind pensioner, such as the duly appointed and qualified administrator or executor of his estate, would be entitled to receive payment on the pension check previously paid to the pensioner for the accrued pension, which would be part of the assets of the deceased pensioner's estate.

Under the facts of the second question, no check had been paid to the pensioner, but it is asked whether or not the legal representative of a deceased pensioner can claim a proportionate part of a month's pension where the pensioner had died during the month.

It is our understanding of the procedure that ordinarily the pensioner, who has been certified to the Division of Welfare and whose name appears on the roll, does not receive his check for a month's pension until the end of the month when he is paid by check for the entire month's accrued pension. But it is our thought that where a pensioner dies in a particular month and his name has been placed upon the pension rolls of the Division of Welfare, there has accrued to him a portion of a month's pension up to the date of his death and that there is a vested right existing to this portion of the accrued and unpaid pension. It is a right in the nature of a claim for money against the state arising out of the statutes providing for blind pensions to those eligible and who have been properly certified to the Division of Welfare. Consequently, we believe that the accrued but unpaid pension for that portion of the month up until the date of the pensioner's death would also be an asset of his estate for which his legal representative would have a valid claim.

In the case of Foot vs. Knowles, 45 Mass. 386, 4 Metcalf 386, the court was determining who should receive an accrued but unpaid pension given by act of Congress to widows of soldiers in the War of the Revolution. The plaintiff was executor of a widow's estate, said widow having died before the accrued pension had been paid to her, and the plaintiff was claiming the pension payment as part of her estate. In ruling for the plaintiff, the court, at 1.c. 388, 389, 390, said:

" * * * The whole provision of the statute directly bearing on the question before us is that contained in the third section of the act of 1836, in these words: 'If any person, who served in the war of the revolution, in the manner specified in the act passed June 7th 1832, have died, leaving a widow whose marriage took place before the expiration of the last period of his service, such widow shall be entitled to receive, during the time she may remain unmarried, the annuity or pension which might have been allowed to her husband by virtue of the act aforesaid, if living at the time it was passed."

"By force of this act, the pension in such case is to enure to the widow, and the right to receive any money due her on the same would seem to vest in her as a part of her estate, to the extent of the entire amount accruing on the same prior to her death; certainly as to all that part falling due prior to the last semi-annual pay day."

* * * * * * * * * *

" * * It was held by the war department, and is conceded here by all parties, that the testatrix was the person originally entitled to the pension money. She had properly presented her claim to it, and furnished the necessary evidence to sustain her claim: All which is shown by the pension certificate. Under these circumstances, we think the right to receive the arrearages attached to her estate, and that the same was assets in the hands of her legal representative. * * * "

In the above case, there was no provision in the pension law providing for payment of accrued but unpaid pensions to a legal representative of the deceased pensioner, nor is there any such provision in our present blind pension law, yet the court held, and we believe correctly so, that the accrued and unpaid pension was an asset in the hands of the legal representative and was a part of the deceased pensioner's estate.

In the case of Kieran vs. Hunter College Retirement Board, 7 N.Y.S. (2d) 612, an action was instituted by the executors of the last will and testament of Kieran to recover from the Hunter College Retirement Board a portion of retirement allowance which was alleged to be due the deceased. The pensioner had been retired September 1, 1933, and the pension had been paid him through March 31, 1936. Kieran, the pensioner, died April 25, 1936, and this action was brought to recover 25/30ths of the pension for the month of April, or that portion of the month's pension up to the date of the pensioner's death. The principal question involved was whether the apportionment for the month of April should be allowed. In ruling for the plaintiffs and in favor of the apportionment, the Supreme Court of New York, Appellate Division, said at 1.c. 613-614:

"The defendants urge, first, that an apportionment is prohibited by Section Gul-19.0 of the Administrative Code. This section provides that a retirement allowance 'shall be paid in equal monthly installments, and shall not be decreased, increased, revoked or repealed except as otherwise provided in section Gul-15.0 of the code.' We find nothing in this section of the code which prohibits the apportionment of the unpaid part of a pension. The fixing of a date for regular payments is obviously done for administrative convenience. It does not indicate any intention to cause a forfeiture of unpaid parts of pensions."

* * * * * * * * * *

" * * While the legislature might have provided that under the Retirement System there should be no apportionment, in the absence of a clear provision such a forfeiture will not be presumed. It was said in Matter of Juilliard's Will, 238 N.Y. 499, 144 N.E. 772, that 'a stipulation against the statutory rule of apportionment should not be implied from words of doubtful construction.' (Page 775.)

"In the case before us no words of doubtful construction exist. No part of the statute indicates an intention to prevent an apportionment.

"Judgment should be directed for plaintiffs

without costs."

The same, we believe, would be true under the facts of your second question. That is to say, there would accrue to the blind pensioner, who dies in the particular month, a portion of that month's pension up to the date of his death, and that upon the death of the pensioner, the accrued but unpaid portion of the month's pension would be an asset of his estate which should be paid to his legal representative. While the Legislature might have provided under the blind pension law that there should be no apportionment, we find no part of the law indicating an intention to prevent an apportionment, and, therefore, in the absence of a clear provision, no forfeiture of a month's pension should be presumed.

CONCLUSION

It is, therefore, the opinion of this department that in answer to the questions you have submitted, that:

- (1) Where a pension check has been paid to a blind pensioner for a particular month and said pensioner dies before cashing the check, the legal representative of said deceased pensioner, upon correctly endorsing the check, is entitled to receive payment of the pension check as part of the assets of the deceased pensioner's estate.
- (2) Where a blind pensioner dies during a particular month, there has accrued to him a portion of that month's payment up to the date of his death which constitutes an asset of his estate, and, therefore, should be paid to his legal representative.

Respectfully submitted,

APPROVED:

RICHARD F. THOMPSON Assistant Attorney General

J. E. TAYLOR Attorney General

RFT:VLM

October 16, 1949

10/18/49

Honorable John M. Cave Prosecuting Attorney Callaway County Fulton, Missouri



Dear Sir:

Reference is made to your request for an official opinion of this department, reading as follows:

"Your opinion is hereby requested upon the following set of facts: The County Court of Callaway County constructed a bridge across a stream along a County road; subsequently a Special Road District was created including in its area a portion of the road containing the bridge; thereafter the road became impassable for any vehicle due to erosion of the road by the stream; after the creation of the Special Road District and until the road became impassable the costs of maintaining and repairing that bridge was borne by the Special Road District; in the order creating special road districts no mention is made of the ownership of the bridge in any respect. The County Court now desires to remove and rebuild the bridge on a different county road outside of the Special Road District. The impassable road is not, and for about two years has not been used by the public, all travel being upon other roads nearby. Under such circumstances, does the County Court have authority to remove that bridge, or does the bridge belong to the Special Road District? If the latter, in what way may the Special Road District give permission to the County Court to remove and relocate the bridge?"

We have been further advised that the special road district referred to in your letter was originally incorporated under the provisions of what now appears as Article 10 of Chapter 36, R. S. Missouri, 1939. We are further advised that the portion of the road upon which the bridge is located has been vacated by an order of the Callaway County Court under date of February 1, 1949.

The primary question raised by your inquiry is whether or not the incorporation of a special road district, encompassing an area within which is included a bridge previously built from county funds, has the effect of divesting title to such bridge from the county court as trustees for the inhabitants of the county.

We have examined the provisions of Article 10, Chapter 46, R. S. Missouri, 1939, and do not find that such transfer of title is so effectuated. It is true that the board of commissioners of such a special road district does have supervisory control over the public roads and highways within the area of such special road districts and is further authorized to maintain and repair such roads and bridges. The board of commissioners has further power with respect to the acquisition of necessary materials, tools, labor, etc., to carry out its duties. Section 8682, R. S. Missouri, 1939, reads as follows:

"Said board shall have sole, exclusive and entire control and jurisdiction over all public highways within its district, outside the corporate limits of any city or village therein to construct, improve and repair such highways, and shall remove all obstructions from such highways, and for the discharge of these duties shall have all the power, rights and authority conferred by general statutes upon road overseers, and said board shall at all times keep the public roads under its charge in as good repair as the means at its command will permit, and for this purpose may employ hands at fixed compensations, rent, lease or buy teams, implements, tools and machinery, all kinds of motor power, and all things needful to carry on such road work: Provided, that the board may have such road work or any part of such work done by contract, under such regulations as the board may prescribe."

We do not think it can be said that the provisions of this statute will serve to divest the title to a bridge located within such special road district from the county court. We are persuaded to this view not only by reason of the fact that no specific provision to this effect appears within the statute itself, but also by reason of the provisions of Section 8534, which provides that on the first instance the county court of any county shall determine what bridges are to be built. This section reads as follows:

"Each county court shall determine what bridges shall be built and maintained at the expense of the county and what by the road districts: Provided, that no road district shall be compelled to build a bridge which costs fifty dollars or more."

Further, it is noted that all provisions for the acquisition of right of way for the construction of county roads and bridges are to be maintained in the name of the county and that conveyance of title to such right of ways are to run to the county court as trustees for the county. Further, it is noted that under the provision of Section 8706, R. S. Missouri, 1939, upon dissolution of a special road district of the nature of that hereunder consideration, no specific provision is made for the reversion of title to any of the title, whether tools, machinery, bridges, etc., to the county.

From the foregoing we are led to the belief that the intended purpose of the general road laws and specific statutes relating to special road districts disclose that title to all easements, bridges, etc., remain in the county and that in special roads districts the commissioners thereof are merely trustees with respect to such items. The powers exercised by such commissioners are declared by Section 8686, R. S. Missouri, 1939, to be merely the "rights, powers and authority conferred by general statute on road overseers." From this it cannot be said that such commissioners are invested with the title to such portion of the roads, bridges, etc., as may be under their jurisdiction.

Having reached this conclusion, it is unnecessary to pass upon the second question you have proposed.

CONCLUSION.

In the premises we are of the opinion that the title to a bridge erected out of county funds remains in the county court even though such bridge be located within the boundaries of a subsequently

incorporated special road district; and that upon vacation of the county road, of which such bridge forms a part, the county court may dispose of such bridge in the same manner as any other county property. In other words, it may be disassembled and reassembled in a location which will serve the interests of the public in carrying traffic across streams or it may be disposed of for cash.

Respectfully submitted,

APPROVED:

WILL F. BERRY, JR. Assistant Attorney General

J. E. TAYLOR Attorney General

WFB/few

SUPREME COURT: Marshal of Supreme Court not entitled to retain fees for service of process under Supreme Court Rule No. 5.04.

February 11, 1949

2-19.

2-11

Mr. Roy Cherry Marshal of the Supreme Court of Missouri: Jefferson City, Missouri

Dear Mr. Cherry:

This is in reply to your letter of recent date, requesting an opinion from this department, which reads as follows:

"Section 2050, Art. II, Chap. 10, R. S. Mo. 1939, as amended by the General Assembly in 1945, relating to the compensation and expenses of the marshal of the Supreme Court, reads in part as follows:

'All fees received by the marshal for services rendered as such marshal shall be paid into the state treasury for the benefit of the General Revenue fund, said marshal to submit to the state auditor at the end of each year a sworn statement of all fees received by him in his capacity as such marshal and that he has not retained for his own use any such fees.

"I have recently served a number of subpoenas for the Missouri Bar Administration and have collected the fees and mileage as provided by law. I would like to have your opinion as to whether these fees and mileage should be paid into the state treasury and I file an expense account for such expenses as I incurred in serving these subpoenas, or whether I should retain such fees and mileage for my own use."

Section 2050, R. S. Mo. 1939, as reenacted, Laws 1945, page 823, provides for the compensation to be received by the marshal of the Supreme Court, discloses how the same is to be paid and what disposition is to be made of fees collected for services rendered as such marshal. We quote the section in its entirety

FILED 16 Mr. Roy Cherry

as follows:

"The marshal of the Supreme Court shall receive as compensation for his services as such marshal four thousand five hundred dollars (\$4,500.00) per annum, to be payable in monthly installments, and shall also be entitled to receive his actual expenses of travel and his necessary expenses for subsistence when travelling on his duties as such marshal at the direction of the Court or the Chief Justice thereof, and if such travel includes the transportation of prisoners, he shall also be paid any additional actual expenses of the travel of said prisoner or prisoners and their necessary expenses for subsistence. The said Court or Chief Justice thereof may authorize the marshal to employ a guard at a compensation not in excess of four dollars (\$4.00) per day and the marshal shall be entitled to receive any additional expense of travel of said guard and his necessary expenses for subsistence. Such salary and expenses of the marshal, including the expense of the prisoners and guard, and such compensation of the guard, shall be paid from the State Treasury on requisition of the Chief Justice certified to the State Auditor. All fees received by the marshal for services rendered as such marshal shall be paid into the State Treasury for the benefit of the General Revenue Fund, said marshal to submit to the State Auditor at the end of each year a sworn statement of all fees received by him in his capacity as such marshal and that he has not retained for his own use any such fees." (Underscoring ours.)

Prior to reenactment in 1945, of the above statute, the marshal of the Supreme Court of Missouri received as compensation for his services a fixed sum of \$2500.00 per annum, plus fees collected in an amount not to exceed \$500.00 per annum. All fees collected per annum over and above the \$500.00 retained by the marshal were to be paid into the state treasury for the benefit of the revenue fund. The statute as it now stands provides for compensation to the marshal for his services as such marshal of a fixed sum of \$4500.00 per annum plus actual expenses of travel and his necessary expenses for subsistence when traveling on his duties as such marshal at the direction of the Court or the Chief Justice thereof, and if such travel includes the transportation

of prisoners he shall also be paid any additional actual expenses of the travel of said prisoner or prisoners and their necessary expenses for subsistence. The present statute contains the same directive to the marshal, as before its reenactment, relative to reporting and accounting for fees collected but not to be retained by him.

The sole question to be determined under the inquiry is whether or not you are to pay into the state treasury the fees you collect and receive for serving process described in Supreme Court Rule No. 5.04, which rule provides:

"Upon application under the provisions of Section 5.03 of this rule, the Clerk of this Court shall issue writs of subpoena, including subpoena duces tecum and dedimus to take depositions. The Committees are empowered to take and transcribe the evidence of witnesses who shall be sworn by any member thereof, and the Committee shall report to this Court the failure of any person to attend and testify in response to any subpoena issued as herein provided."

The Supreme Court of Missouri, in its Rule No. 5.03 refers to "compulsory process" as outlined in the above quoted Rule No. 5.04. The quoted rule provides that the clerk of the Supreme Court shall issue the three types of process described therein upon proper application being made therefor. Applications for such process are made by Circuit Bar Committees and the Advisory Committee when carrying out their duties under Supreme Court Rule No. 5. While discussing the process described in Supreme Court Rule No. 5.04, it becomes of importance in this instance to note the provision contained in such rule providing that "# * #the committee shall report to this court the failure of any person to attend and testify in response to a subpoena issued as herein provided." The subpoenas you have served have been placed in your hands for porper service pursuant to authority contained in Supreme Court Rule No. 5.04. As a ministerial office of the Court you have served the process and collected the service fees provided by law for service of like process. Your inquiry does not disclose any contention on your part that such service of process is not an act done as marshal of the Court. The type of process being considered, the source from which it eminates, and the supervision over such process by the Supreme Court as disclosed in its Rule No. 5.04, rules against any possible contention that your service in this regard has not been rendered as marshal of the Supreme Court.

prrections may not be APPROPRIATIONS: Appropriation to Depar fiture and furnishings used to purchase househo. of Missouri. for residences owned by St souri upon residences Rent received by State of M STATE MONEY: owned by state to be paid to the Department of Corrections for transmittal to the state treasurer. June 29, 1949 Mr. Leo J. Clavin State Purchasing Agent Jefferson City, Missouri Dear Sir: Reference is made to the request of your predecessor in office for an official opinion of this department, reading

as follows:

"We have received several requests, to purchase household furnishings for the State owned residence of the Superintendent of Industries, The Warden and the Director of Penal Institutions.

"I would appreciate having your opinion, as to whether or not, we have authority to buy household furnishings for these so called residences, as I am under the impression, that these houses are rented unfurnished.

"Second, if these houses are rented as such, I would appreciate your further opinion, as to who should collect the rents and to what fund same should be deposited."

For convenience, the opinion will be divided into two elements.

Under the provisions of Sections 11008.62 to 11008.84, inclusive, Mo. R.S.A., the duty of purchasing supplies, public printing and negotiating leases on behalf of various state departments has been placed upon the Division of Procurement of the Department of Revenue, headed by the State Purchasing Agent. However, we do not find that such duty also requires such officer to predetermine the legality of proposed purchases. To the contrary, the duty of pre-auditing claims which might

or could arise by virtue of contractual arrangements entered into by the State Purchasing Agent on behalf of the various departments of state has been enjoined upon the Division of Budget and Comptroller of the Department of Revenue. See Sections 11008.34 to 11008.61, inclusive, Mo. R.S.A. However, in view of the likelihood of the precise question which you have asked, being submitted to this department by such certifying officer, it has been decided that an opinion will be written based upon the request.

The general rule with respect to the exercise of property rights over all property, both real and personal, owned by the state is stated thus in 59 C.J., Paragraph 276, page 164:

" * * * The power of the state in respect of its property rights is vested in the legislature, and the legislature alone can exercise the power necessary to the enjoyment and protection of those rights by the enactment of statutes for that purpose; * * * "

It therefore becomes necessary to determine whether or not the General Assembly of this state has, by statutory enactment, enunciated the public policy with respect to the use of the residences referred to in the letter of inquiry.

With respect to the Superintendent of Industries, we do not find any statute authorizing the occupancy of a state owned residence by such officer.

With respect to the Warden of the State Penitentiary, we find that under the provisions of Section 12467, R. S. Mo. 1919, the then Warden of the State Penitentiary was specifically authorized to live "in a house" situated on the penitentiary grounds. The rights of the Warden of the Penitentiary to such occupancy provided under the statute mentioned were specifically abrogated under the provisions of an act found Laws of Missouri, 1921, at page 554, and the privileges theretofore exercised by such Warden with respect to such house were transferred to the newly created office of Director.

All of the above-mentioned statutes were affected by an act of the 63rd General Assembly, found Laws of Missouri, 1945, page 723, and now appearing as Sections 8992.1 to 8992.47, Mo. R.S.A.

In Section 8992.2, Mo. R.S.A., after providing for the appointment of a chief administrative officer of the Department of Corrections to be known as the Director of the Department of Corrections, the following is found:

" * * * The director shall receive a salary of seven thousand five hundred dollars a year and shall in addition have the residence near the penitentiary heretofore used by the director of penal institutions."

From the foregoing, it is apparent that the rights with respect to the occupancy of the residence therein referred to that have been successively enjoyed by the Warden of the State Penitentiary and the Director of Penal Institutions have now been granted to the Director of the Department of Corrections. We assume that such officer is the one referred to in the letter of inquiry as the "Director of Penal Institutions."

We have further examined the provisions of the act creating the Department of Corrections referred to supra, and find that provision has been made under Section 8992.15, Mo. R.S.A., for the appointment of a Warden of the State Penitentiary. However, we do not find that any provision has been made for such officer for the occupancy of any state owned residence.

It therefore becomes necessary to determine whether or not the acquisition of household furniture and furnishings for the residence to be occupied by the Director of the Department of Corrections is a proper expenditure to be made from the appropriation made by the General Assembly to such department. Such appropriation for the current fiscal year is found in Volume II, Laws of Missouri, 1947, page 88. Included in Section 5.020 of such appropriation act, we find the following items:

"C. Repairs and Replacements:

"Building and building equipment, operating equipment, including educational and recreational equipment, household, dining room, and kitchen equipment, hospital, surgical and medical equipment, office furniture and equipment, production and construction equipment (Non-Industrial), shop, garage, and stable equipment (Non-Industrial),

transportation and conveying equipment, farming equipment, and for repainting.

"D. Operation:

"General expense: including communication, printing and binding, transportation, travel within and without the state, rental of lands and buildings, materials and supplies, household supplies, subsistence, clothing, rewards, discharged inmates, convict earnings, bonds, insurance, and other operating expenses... \$668,250.00

It might be thought that the inclusion in the appropriation act of the provision for the purchase of "household" equipment or "household" supplies might serve to authorize such acquisition. However, keeping in mind the general rule that statutory authority must exist with respect to the use of state owned property, we believe that the mere inclusion of these items, which may equally as well be used for the general operation of various institutions under the control of the Department of Corrections, cannot have this effect. We do not find any statute directly and specifically authorizing the furnishing of household furniture or furnishings for any of the officers mentioned in the letter of inquiry, and absent such statutory authority, we do not think that such may be lawfully supplied. Significantly, the original act authorizing the use of the "house" by the Warden specifically included the right to "fuel and light," which has been omitted in subsequent enactments.

Furthermore, it may not be successfully contended that the mere inclusion of the items in the appropriation bill can serve to extend such authority, for to do so would construe the appropriation act as including legislation of a general nature. This may not be done as appears from State ex rel. vs. Canada, 113 S.W. (2d) 783, wherein the Supreme Court said, 1.c. 790:

" * * * Legislation of a general character cannot be included in an appropriation bill. To do so would violate section 28 of article 4 of the Constitution, (retained in substance as Section 23, Article III, Constitution of Missouri, 1945) which provides that no bill shall contain more than one subject which shall be clearly expressed in its title. There is no question but

what the mere appropriation of money and the amendment of section 9622, a general statute granting certain authority to the board of curators, are two different and separate subjects. State ex rel. Davis v. Smith, 335 Mo. 1069, 75 S.W. 2d 828; State ex rel. Hueller v. Thompson, 316 Mo. 272, 289 S.W. 338. * * * "

(Words in parentheses ours.)

From the foregoing, we are persuaded to the opinion that statutory authority does not exist for the occupancy of state owned residences by any of the officers mentioned in the letter of inquiry, and that the only such officer employed by the Department of Corrections so entitled is the Director of the Department of Corrections. It is our further opinion that the provisions of the appropriation act, Laws of Missouri, 1947, Volume II, page 88, do not authorize the acquisition of household furniture and furnishings to be used in any state owned residences under the supervision of the Department of Corrections.

II.

The second question found in the letter of inquiry relates to the proper person to receive rentals based upon the occupancy of state owned residences under the control of the Department of Corrections.

In this regard your attention is directed to Section 15, Article IV of the Constitution of Missouri, 1945, reading as follows:

"The state treasurer shall be custodian of all state funds. All revenue collected and moneys received by the state from any source whatsoever shall go promptly into the state treasury, and all interest, income and returns therefrom shall belong to the state. * * * "

While no specific statutory reference to the proceeds of the rentals of state owned property has been found, it is our thought that money so received should go into the General Revenue Fund of the state. Section 9045, R. S. Mo. 1939, reads as follows:

"The commission shall attend to the financial concerns of the penitentiary and shall pay into the state treasury all moneys received by them on account of the institution, and shall keep in suitable books regular and complete accounts of all moneys received, and from what source, and shall have vouchers for all money disbursed. The books shall exhibit the profits or losses of each branch of manufacturers."

The duties of the "commission" referred to in the quoted statute have been transferred to the Department of Corrections under the provisions of Section 8992.1, Mo. R.S.A. It therefore seems that such department should make the collections of rentals and handle the same in accordance with the statute quoted.

CONCLUSION

In the premises, we are of the opinion that household furniture and furnishings may not be acquired by the State Purchasing Agent on behalf of the Department of Corrections to be placed in and used by the occupants of the state-owned residences under the control of the Department of Corrections.

We are further of the opinion that rentals accrued by the virtues of the occupancy of such state-owned residences are to be collected by the Department of Corrections and by such agency transmitted to the State Treasurer in accordance with the provisions of Section 9045, R. S. Mo. 1939.

Respectfully submitted,

WILL F. BERRY, JR. Assistant Attorney General

APPROVED:

J. E. TAYLOR Attorney General

WFB:VLM

APPROPRIATIONS: Appropriation for eradication of Bangs disease in cattle may be made out of "The Missouri Postwar Reserve Fund."

Andrews ...

April 11, 1949

4-12

Honorable Fred R. Columbo Chairman House Appropriations Committee State Capitol Building Jefferson City, Missouri

Dear Sir:

This is in answer to your letter of recent date requesting an official opinion of this department and reading as follows:

> "The Veterinary Division of the Department of Agriculture is planning an extensive program to eradicate Bangs Disease in cattle throughout the State of Missouri.

"On account of the wide spread prevalence of this dreaded disease the program calls for a project of such magnitude that will necessitate the appropriation of a large sum of money. On account of many cases of Undulant Fever, the direct cause of which comes from the drinking of milk from dairy cows affected by this disease, we are anxious to do everything we can to assist in this program.

"If legal, we would like to make the appropriation for this purpose out of the Postwar Reserve Fund, but do not know if an appropriation of this nature would come within the purpose of Section 1 of House Bill No. 14, page 223 of the 1945 Laws of Missouri. On this point we would be pleased to have an opinion from your department, at your earliest convenience, so that the House Appropriations Committee can

govern itself accordingly. "Thanking you, I remain "

Section 1, Laws of Missouri, 1945, page 223, which section creates the Missouri Postwar Reserve Fund, reads as follows:

"There is hereby created a postwar reserve fund to be known as 'The Missouri Postwar Reserve Fund! which shall consist of moneys appropriated by the General Assembly of the State of Missouri to be credited to such fund, and any moneys paid into the state treasury, and required by law to be credited to such fund. This fund shall be kept separate and apart from all other moneys in the state treasury and shall be paid out as provided by law. Such moneys, after appropriation pursuant to law, shall be available only for postwar capital projects, postwar public works, postwar unemployment projects, and for other purposes considered by the general assembly to be necessary for postwar rehabilitation and improvements for Missouri and for the administration expenses of such projects, for the preparation and review of plans and specifications for such purposes, for engi-neering and other services incidental to postwar planning, including field surveys and sub-surface investigations, and other matters necessary for the carrying out of postwar projects."

We believe that the intent of the Legislature in creating the Missouri Postwar Reserve Fund was to provide a fund from which improvements and projects necessary for the well being of the state could be made and that a determination of the necessity for such projects is in the Legislature. The fact that Bangs Desease is prevalent

throughout the entire State of Missouri and is adversely affecting the livestock industry of this state, and the fact that the prevalence of Bangs Disease in cattle is causing the health of our citizens to be impaired through contracting undulant fever, we believe is ample reason for a determination by the Legislature that the eradication of Bangs Disease in cattle is a purpose necessary to be carried out in this state and that it is a purpose laid down in the section creating the Postwar Reserve Fund, which authorizes the expenditure to be made out of such Postwar Reserve Fund. We find the following, with regard to animal diseases which may be transmitted to mankind, in 3 C.J.S., page 1151:

"Those diseases afflicting domestic animals which are transmissible to mankind or which are likely to assume epidemic proportions are universally regarded as dangerous to the public health or at least as a scourge upon the legitimate, and frequently important, industry of live stock raising. It is, therefore, clearly within the police power of a state to prescribe and enforce regulations to stamp out or prevent the spread of such diseases in the furtherance of the general welfare; and it is also within the state's sovereign powers to enact and bring into operation such sanitary measures as are suitable to the fostering of the live stock industry. * * * . "

We do not believe that expenditures out of the Postwar Reserve Fund are limited to the construction of buildings, roads or structures, but that the expenditures out of the Postwar Reserve Fund may be made for such projects as the Legislature may deem necessary for the welfare of the State of Missouri.

CONCLUSION.

It is the opinion of this department that an appropriation for the eradication of Bangs Disease in cattle

Honorable Fred R. Columbo -4-

in the State of Missouri may be made from "The Missouri Postwar Reserve Fund" which fund is created by Section 1, Laws of Missouri, 1945, page 223.

Respectfully submitted,

C. B. BURNS, Jr. Assistant Attorney General

APPROVED:

J. E. TAYLOR Attorney General

CBBJr:ir

MOTOR FUELS

APPROPRIATIONS) Legislature may appropriate money for payment of) motor fuel tax refunds when claims are submitted in) accordance with Sections 16, 17, and 18, 1943 Laws, pages, 690, 691 and 692.

May 25, 1949

Honorable Fred R. Columbo Chairman, House Appropriations Committee House of Representatives Jefferson City, Missouri



Dear Sir:

Your letter at hand requesting an opinion of this Department which reads as follows:

> "Our Appropriations Committee has before it quite a number of claims for Gasoline Tax Refunds, etc., from individuals and corporations desiring relief in the form of an appropriation from the Legislature, but we are confronted by Section 40, page 1442 of the 1945 Laws of Missouri, which reads as follows:

> > "'Section 40. Claims against State to be presented to comptroller within two years. Persons having claims against the state shall exhibit the same, with the evidence in support thereof, to the comptroller, for his approval, within two years after such claims shall accrue, and not thereafter.

"We feel that these claims constitute honest, legal debts obligated by the statutes of Missouri, and are doubtful if the above mentioned section applies to acts of the Legislature. On this point we would be glad to have an opinion from you clearing up the matter, as . we do not desire to appropriate money for these claims if they cannot legally be paid after enacted by the Legislature."

It appears from your request that in appropriating money for paying claims for refund of motor fuel taxes, the House Appropriations Committee is concerned about appropriating only enough money to pay those claims that are valid.

Regarding claims of this type your attention is directed to Sections 16, 17, and 18, Laws of Missouri, 1943, pages 690, 691, and 692, which declare the conditions upon which refunds of motor vehicle fuel taxes shall be made, and based upon these sections, previous appropriation bills have been passed by the General Assembly for the purpose of paying these tax refunds.

Section 16 provides for refunding of motor fuel taxes paid on motor fuels subsequently lost or destroyed, and reads as follows:

"Every person other than a distributor who shall have purchased motor fuel in this state and shall have paid the tax herein imposed on such motor fuel shall be entitled to a refund of the amount of tax so paid by him on any such motor fuel which is lost or destroyed, while he shall be the owner thereof, through theft, leakage, fire, explosion, lightning, flood, storm, or other casualty, except evaporation, shrinkage or unknown cause; provided, such persons shall notify the administrator in writing of such loss or destruction and the amount of motor fuel lost or destroyed within thirty (30) days from the date of discovery of such loss or destruction, and provided further, that within thirty (30) days after such notice, such person shall file with the administrator an affidavit sworn to by the person having immediate custody of such motor fuel at the time of such loss or destruction, setting forth in full the circumstances and amount of the loss or destruction and such other information with respect thereto as the administrator may require.

"In the event that the administrator is satisfied that said fuel was lost or destroyed as claimed, he shall cause the amount of tax that said person paid, either directly or indirectly through the amount of the tax being included in the purchase price, at the time said fuel was purchased, to be refunded by a requisition upon the state auditor for a warrant on the state treasury for the amount due to said person."

Section 17 provides for refunding of taxes paid on motor fuels used for a purpose other than for operation of motor vehicles upon

the highways of this state, and in part reads:

"All motor fuels distributed or sold in this state by any person shall be presumed to have been sold for use in propelling motor vehicles upon the public highways of this state; provided, however, that any person who shall buy and use motor fuel for any purpose whatever, except in the operation of motor vehicles upon the highways of this state, who shall have paid or have had charged to his account the license tax required by this act to be paid, either directly or indirectly through the amount of such tax being included in the price of the fuel, shall be reimbursed and repaid the amount of said tax, upon presenting a claim therefor to the administrator.

"The claim to the administrator shall be in the form of an affidavit, stating the purpose for which said fuel was used, and shall be supported by the original sales slip or invoice covering the purchase of said fuel. The term, 'original sales slip or invoice, ' as used herein, shall mean the top copy and not any duplicate original or carbon copy of the invoice or sales slip. The original sales slip or invoice must bear the following legend; 'This is customer's invoice, or some similar legend, and shall in addition contain the following information: (1) date of sale, (2) name and address of purchaser (which must be the name of the claimant), (3) name and address of seller, (4) number of gallons purchased and price per gallon, (5) Missouri motor fuel tax, as a separate item.

"No claim for refund of motor fuel tax under this section shall be allowed unless the supporting original invoice or sales slip indicates on its face that the purchaser at the time of purchase declared to the seller of said motor fuel his intention to use the motor fuel thus purchased for purposes other than the propelling of motor vehicles upon the public highways of this state, and declared his intention to claim a refund of the tax paid as

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a part of the purchase price of said fuel. As evidence of this declaration of intention, the seller of said fuel shall, at the time of the sale, indicate, by stamp or otherwise, on the face of the original invoice or sales slip, a certification that such declaration of intention was made. * * *

"All applications for refunds under this section must be filed with the administrator within one hundred twenty (120) days of the date of purchase, as shown on the original invoice or sales slip. Upon the receipt of such affidavit and invoice or sales slip, the administrator, upon approving the same, shall cause the amount of the tax that such claimant paid to be refunded by a requisition upon the State Auditor, supported by said claim, for a warrant upon the State Treasurer, payable to said claimant. Said warrant shall be paid by the Treasurer out of any funds, appropriated by the Legislature for said purpose."

Section 18 provides for refund of taxes erroneously paid on motor fuel purchased by a distributor and reads:

"(a) That where, in any case, it appears to the satisfaction and approval of the administrator that any person, licensed and bonded in the State of Missouri as a motor fuel distributor, has paid to the State of Missouri, any motor fuel license tax in error, then, in that event, the administrator is hereby authorized and empowered to certify to the State Auditor a requisition for a warrant in favor of such person, for such sum or sums erroneously paid to the State of Missouri and the Treasurer of the State is hereby authorized and required to accept and pay the same out of any funds appropriated for refund purposes; or the administrator may elect, and is hereby authorized and empowered, in lieu of such warrant, to permit the deduction of such overpayments of motor fuel tax from subsequent reports as a credit against and upon any motor fuel tax which may thereafter be due and payable to the State of Missouri, by such person.

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"(b) No refunds shall be made under the provisions of this section except upon a written claim therefor setting forth the circumstances by reason of which such refund shall be allowed. The claim shall be in such form as the administrator shall prescribe and shall be sworn to by the claimant, and filed with the administrator within five (5) years from the date of payment of the taxes illegally or erroneously collected."

The above quoted sections are the only ones relating to and providing for a refund of taxes paid on motor fuels. These sections set out the conditions upon which a tax refund can be obtained, and also prescribe the procedure that must be followed to obtain said refund.

It is therefore our view of the matter that the claims for refund of taxes paid on motor fuels which are legal, are those that are presented in the manner and under the conditions set out in the sections above cited. When these claims so submitted meet the satisfaction and approval of the administrator, a requisition for the amount of refund due the claimant is made on the State Treasury, and the same is paid out of the money appropriated for this purpose.

We do not believe that Section 40, supra, set out in your request is applicable to these types of claims. Section 40 and Sections 16, 17, and 18, supra, have application to a similar subject matter; i.e., claims against the State. However, Section 40 is general in character and the other sections are special, and have particular application to particular types of claims, and we believe constitute an exception to the general statute. Consequently, we view the law to be that the special statutes directly relating to claims for refunds of taxes paid on motor fuels would prevail. State ex rel. Buchanan County v. Fulks, 247 S.W. 129, 296 Mo. 14; State v. Mangiaracina, 125 S.W. (2d) 58, 344 Mo. 99; State ex inf. Barrett v. Imhoff, 238 S.W. 122, 291 Mo. 345.

In applying the rule of statutory construction, the Supreme Court in the Fulks case said at S.W., 1. c./132:

"The canons of construction require that the two statutes relating to the same subject should be harmonized and read together as constituting one law; the special being viewed as an exception to the general statute; * * *" Though not so stated in your request, it is our thought that at least some of the claims to which you refer have already cleared through the administrator of motor fuels, and the said claims have been presented in compliance with those sections of the statutes herein cited relating to refund of taxes paid on motor fuels. They unquestionably would be legal claims subject to payment from moneys appropriated by the Legislature.

Regarding claims generally now in your possession, if what you state about them is true, in that you say, "We feel these claims constitute honest, legal debts obligated by the statutes of Missouri," then, we believe that the Legislature would probably be justified in making an appropriation for their payment. In State ex rel. S. S. Kresge Co. v. Howard, 208 S.W. (2d) 247, the Supreme Court of Missouri at 1. c. 250-251 said:

" * * The State itself, without intervention of judicial process which was not necessary under the circumstances, has seen fit to acknowledge its lawful obligation to relator by making the appropriation. And certainly the State may appropriate money for the payment of its lawful obligation unless, because of particular circumstances, there is some constitutional bar.

"Respondent contends the appropriation offends several constitutional provisions. Section 38 of Article III, Constitution 1945, Mo. R.S.A. denies the general assembly the power to grant public money or lend public credit to any private person or corporation. This prohibition does not apply to the appropriation to relator because it was in payment of a valid public obligation, and was not a grant or gift of public money. As was said in Re Monfort's Estate, 193 Minn. 594, 259 N.W. 554, 555, 98 A.L.R. 280, under a similar constitutional provision: 'There is nothing in the Constitution forbidding the state to recognize and pay its just debts.' ****

However, we must point out that in the above case, the lawful obligation which the Legislature sought to pay by an appropriation was one that arose out of payment by relator of a tax illegally exacted; and, in view of the forfeitures and penalties which would have been sustained by the relator had the tax not been paid, the

May 25, 1949

court held that the payment of the tax was made involuntarily. The court in this case recognized previous rulings made in other cases, that a tax voluntarily paid cannot be recovered, and it is our thought concerning the payment of motor vehicle fuel taxes that they are originally paid voluntarily; nor would their nonpayment result in any hardship in the nature of forfeitures and penalties as would have been sustained by the relator in the Kresge case.

Lacking further information regarding the claims you now have under consideration and particularly the conditions and circumstances under which the taxes were originally paid, we can only advise you as to those claims for tax refunds which have been submitted in accordance with Sections 16, 17, and 18 of the 1943 Laws, supra.

CONCLUSION.

It is therefore our opinion that claims for refund of taxes paid on motor fuels which are presented within the time, under the conditions, and in the manner provided in Sections 16, 17, and 18, Laws of Missouri, 1943, pages 690, 691, and 692, are legal claims for which the Legislature could appropriate money for their payment. It is our further opinion that Section 40, page 1442, Laws of Missouri, 1945, is not applicable to these types of claims.

Respectfully submitted,

APPROVED:

RICHARD F. THOMPSON Assistant Attorney General

J. E. TAYLOR Attorney General

RFT/few

COUNTY TREASURERS: TOWNSHIP ORGANIZATION:

Must pay deputy and clerical hire from own compensation.

September 17, 1949

Honorable Clyde E. Combs Prosecuting Attorney Barton County Lamar, Missouri



Dear Sir:

This office is in receipt of your request for an official opinion in which you inquire as to the liability of Barton County for the compensation of an employee of the treasurer and ex-officio collector of Barton County, which is a county maintaining township organization. In subsequent correspondence you have advised that the individual in question was in fact a clerk during all of the times covered by your request, and so considered by the Collector, who never included an item for the compensation of such clerk in his budget.

You refer in your request to an opinion rendered by this office under date of October 3, 1945, to the Honorable George A. Spencer, then Prosecuting Attorney of Boone County, but which may be distinguished from the instant question by reason of the fact that it involved an outlay for stenographic assistance and clerical expense where the statutes of Missouri were silent on the question of the compensation of such expense incident to the office.

In the matter of clerical and deputy hire for the office of treasurer and ex-officio collector in counties such as Barton County, having township organization, Section 11107, R. S. Mo. 1939, provides:

"That the officers referred to in section 11106, in addition to the maximum amount of fees and commissions permitted to be retained by county collectors as provided in section 11106, Revised Statutes of Missouri for 1939, each such officer may retain for the payment of deputy and/or clerical hire a sum not to exceed twenty-five per cent of the maximum amount of fees and commissions which such officer is permitted to retain by said section as so amended, but such deputy and/or clerical hire shall be payable out of fees and commissions earned and collected by such officer only and not from general revenue. Laws 1935, p. 406."

If this section is applicable to the office of treasurer and ex-officio collector under township organization, then it clearly defines the compensation which may be paid for a clerk in the position set out in your request, with the supplemental information given. If such office is mentioned in Section 11106, referred to in the above quoted section, then the answer is clear. Section 11106, R. S. Mo. 1939 does refer to such office in the following language:

"* * * Provided, however, that this section shall not apply to any county adopting township organization, so far as concerns the rate of per cent to be charged for collecting taxes, but shall apply to counties under township organization so far as to limit the total amount of fees and commissions which may be retained annually by the county treasurer and ex officio collector for collecting taxes in such counties: * * *"

A recent decision by the Supreme Court of this State involved the salary of a deputy to the treasurer and ex-officio collector of Stoddard County and the two statutes above referred to were discussed by the court. In Alexander v. Stoddard County, 210 S.W.(2d) 107, literal interpretation was given to Section 11107, supra, the decision stating: (1.c. 109)

"The precise question is not before us and for that reason we do not pass upon whether these sections authorize deputies for ex officio collectors in counties undertownship organization. But, whether they do or do not authorize such deputies, they plainly indicate the source of their pay and limit it to "fees and commissions earned and collected by such officer only and not from general revenue." There is no allegation in the plaintiff's petition taking his claim out of this section, regardless of the necessity and reasonableness of the expenditure.

"(2,3) In any event the legislature has the power to fix and limit the salaries of deputies and "As a general rule compensation for services rendered by assistants, deputies, and other employees can be allowed directly to them or to their superiors only as authorized by law; and where no provision is made for the

payment, or for the appointment or employment of deputies and assistants, the latter must look exclusively to their employers for compensation, and such employer cannot look to the county for reimbursement.* * * Under other statutes deputies are to be paid by the principal out of the fees received by him in excess of the amount which he is to retain for himself, and the county is not liable for the salaries of such deputies. 20 C.J.S., Counties, Secs. 122, 129; 43 Am. Jur., Sec. 465, p. 222; Gage County v. Wilson, 38 Neb. 165, 56 N.W. 810."

The same decision points out the distinction referred to in the second paragraph of this opinion, between those cases following Howell County v. Rinehart, 348 Mo. 421, 153 S.W.(2d) 381 (which was the deciding authority in the Spencer opinion), and those following Ewing v. Vernon County, 216 Mo. 681, 116 S.W. 518. The latter line of cases limits compensation to that provided by statute, and must govern in the instant case.

CONCLUSION

It is therefore the conclusion of this office that the treasurer and ex-officio collector of Barton County, a county having township organization, is required to pay all deputy and clerical hire pertaining to his office from a sum not exceeding twenty-five per cent of the maximum amount of fees and commissions which treasurer and ex-officio collector is permitted to retain, and that such deputy and clerical hire may not be paid from general revenue.

Respectfully submitted,

ROBERT L. HYDER
Assistant Attorney General

APPROVED:

J. E. TAYLOR Attorney General MAGISTRATES) Telephone is necessary equipment in the Office of the Magistrate and is to be paid for by the County.

November 1, 1949

Honorable J. A. Combs Probate Judge and Magistrate Madison County Fredericktown, Missouri



Dear Sir:

This is in answer to your letter of recent date requesting an official opinion of this Department, and reading as follows:

"May we have your opinion as to whether there is a statute providing that necessary equipment for county offices, including that of the Magistrate Court, shall be paid for by the county in which such offices are located and whether, in your opinion, a telephone would be considered as necessary equipment in the office of the Magistrate Court?"

Section 7, Laws of Missouri, 1945, page 807, provides as follows:

"At the expense of the county the county court, or in the City of St. Louis the board of aldermen by ordinance, shall provide the court and its divisions and officers with proper court rooms and offices at one place in the city, and for the proper care thereof, and with heat, light, furniture, furnishings, office equipment, filing cabinets, typewriters, stationery, office supplies and proper books of account and record, dockets and printed forms of writs, and whatsoever else may be necessary for the proper conduct of the business of the court."

This is the only statute that specifically provides for payment by the city or county of the necessary office expenses of the magistrate, and such law applies only to the City of St. Louis. However, the fact that there is no specific statute authorizing or requiring the payment of the cost of a telephone in the magistrate's office in counties of this state outside the City of St. Louis does not preclude the counties from having the duty of paying the costs of such telephone.

In the case of Rinehart v. Howell County, 153 S.W. (2d) 381, the Supreme Court of Missouri in discussing the contention that since a statute provided that stenographers of prosecuting attorneys in certain counties should be paid by the county, and since no provision was made by statute for payment of such stenographers in other counties, the result must be that where no statute authorized payment by the county, the county was not liable therefor, said at 1.c. 383:

"Appellant's statutory citations constitute legislative recognition of the propriety of expenditures for stenographic services in the discharge of the presentday duties of prosecuting attorneys in the communities affected -- an approved advance in proper instances for the administration of the laws by county officials and the business affairs of the county and for the general welfare of the public. Such enactments, in view of the constitutional grant to county courts, should be construed as relieving the county courts in the specified communities from determining the necessity therefor and, by way of a negative pregnant, as recognizing the right of county courts to provide stenographic services to prosecuting attorneys in other counties when and if indispensable to the transaction of the business of the county, and not as favoring the citizens of the larger communities to the absolute exclusion of the citizens of the smaller communities in the prosecuting attorney's protection of the interests of the state, the county and the public. * * *"

It is our view therefore that Section 7, Laws of Missouri, 1945, page 807, should be construed as recognizing the right of counties to provide necessary equipment and facilities for magistrates.

We are enclosing an official opinion of this Department rendered under date of September 15, 1949, to John M. Rice, Prosecuting Attorney, Newton County, having to do with circuit judges, and we believe that the conclusion reached as to circuit judges in that opinion is equally applicable to magistrates.

CONCLUSION

It is the opinion of this Department that a telephone in a magistrate's office is part of the necessary equipment thereof, and that the county shall pay for the cost of such telephone.

Respectfully submitted,

C. B. BURNS, JR. Assistant Attorney General

APPROVED:

J. E. TAYLOR Attorney General TAXATION EXEMPTIONS:

Church parsonage rented out to private individuals is not exempt from taxation under the provisions of Section 5, Laws of Missouri 1945, p. 1800.

December 17, 1949

Honorable Clyde E. Combs, Prosecuting Attorney, Barton County, Lamar, Missouri

Dear Mr. Combs:

This is in reply to your recent letter wherein you submitted the following statement and request:

"I would like the opinion of your office on the following question: - In the spring of 1937 the Trustees of the M.E. Church South purchased a residence property located on Lots 5 and 6 of Block 11, Wills' Fourth Addition to the City of Lamar, Missouri, subject to the uses and obligations imposed by the Church Discipline, and to be used as a parsonage for the pastor of the Mt. Carmel Circuit, composed of several churches in outlying communities here in the county. The property was used as a parsonage for several years until a pastor was appointed for the circuit who owned and resided in his own property here in Lamar. After his appointment he did not desire to leave his property and continued to live in the same.

"To my knowledge the property was rented in 1947 to lay renters and was assessed by the township assessor for 1947 and a Mr. Alvin Bentlage, a representative of the Mt. Carmel Board, paid the taxes on the property which the church now says was done without its knowledge. From January 1, 1948 to April 1, 1949 the property was rented to a local businessman for \$30. a month and for the years 1948 and 1949 the assessor assessed the property at a \$300 valuation, because the property was income pro-

ducing on January 1st of each of these years. It is my understanding that this property was rented until April or May of this year, at which time a new minister appointed to the circuit moved into the property and it is being used as a parsonage at the present time, and of course, if this use continues until January 1st the property will not be assessed for 1950.

"The Methodist authorities have appeared before the county court several times for an abatement of the 1948 and 1949 tax assessments, which they have not paid, and for a return of the 1947 tax which they say was paid through mistake.

"It is my opinion, under the above facts and in the light of Sec. 10942.4 Laws of 1945, this property does not fall under the exemption statute. I might add however, that the revenue of \$30 per month derived from the property was used one-half to pay the circuit minister's salary, and the other one-half was kept in a fund and very recently used to repair and paint the parsonage in question.

"The church's theory is that this property never lost its exemption as a parsonage and that the temporary use as a rental property during this period did not remove the property from its exemption status. Under the stand taken by the church the county court has requested that I write your office and secure your opinion on this matter. The court feels that if the church is entitled to a rebate under the law, they will so act.

"Inasmuch as the church is contemplating legal proceedings in the matter I would appreciate your opinion as soon as possible."

If this property is exempt, it must be under the provisions of Art. X, Sec. 6 of the 1945 Constitution of Missouri, or Sec. 5, Laws of Missouri, 1945, p. 1800.

Art. X, Sec. 6 of the Constitution is as follows:

"All property, real and personal, of the state, counties and other political subdivisions, and non-profit cemeteries, shall be exempt from taxation; and all property, real and personal, not held for private or corporate

profit and used exclusively for religious worship, for schools and colleges, for purposes purely charitable, or for agricultural and horticultural societies may be exempted from taxation by general law. All laws exempting from taxation property other than the property enumerated in this article, shall be void."

Sec. 5, Laws of 1945, supra, is in part as follows:

*Property exempt from taxes .- The following subjects shall be exempt from taxation for state, county or local purposes: * * * * * Sixth, all property, real and personal actually and regularly used exclusively for religious worship, for schools and colleges, or for purposes purely charitable, and not held for private or corporate profit shall be exempted from taxation for state, city, county, school, and local purposes; provided, however, that the exemption herein granted shall not include real property not actually used or occupied for the purpose of the organization but held or used as investment even though the income or rentals received therefrom be used wholly for religious, educational, or charitable purposes."

Sec. 5 above encompasses the provisions of Sec. 10937 R.S. Mo. 1939, but in addition, adds the words beginning with "provided * * * * * . See above.

The particular words of Art. X, Sec. 6 of the Constitution with which we are most concerned are: " * * * * all property, real and personal, not held for private or corporate profit and used exclusively for religious worship may be exempted from taxation by general law."

For our purposes, the pertinent portion of Sec. 5, Laws of 1945, supra, is as follows: " * * * * all property, real and personal actually and regularly used exclusively for religious worship * * * * *, or for purposes purely charitable * * * * shall be exempted from taxation * * * * *; provided, however, that the exemption herein granted shall not include real property * * * * held or used as investment even though the income or rentals received therefrom be used wholly for religious * * * * purposes.

You state that the parsonage was rented out, that income

was thereby received and that said income was used wholly for church (religious) purposes. You further state that it was during the years 1947, 1948, and 1949 that the parsonage was rented out. The requirements of this statute as applied to a situation such as the one at hand are these: If the parsonage had been used regularly and exclusively for religious worship, it would be tax exempt, but if the parsonage had been held for the purpose of producing rental income, no matter to what purpose said income is applied, the tax exemptions could not be claimed. First then, has the parsonage been used regularly for religious worship? Quite obviously, it has not. For three consecutive years it has been rented out to "local businessmen" and other "lay renters". Regularly here means "steadily". The facts indicate that the parsonage has been used as income property for so extended a period of time that it could just as easily be said that its regular use was to produce income.

Secondly, the parsonage must have been used exclusively for religious worship or charitable purposes. (Underscoring ours.)

The case of State ex rel. v. Y.M.C.A.259 Mo. 233, discusses the purpose of the statute and its effect. The St. Louis Y.M.C.A. was a religious and educational association. In such capacity it owned certain real property located in the City of St. Louis, of which some fifteen per cent of the total area had been converted to income-producing rental property. The contention was made by the religious and educational organization that, in view of the fact that such income as was produced under the rental agreement was used exclusively for the purposes of the organization, its real property had not lost its exemption from taxation. A decree of the circuit court had upheld the right of the state and city to levy and collect general real estate taxes upon the real property in the circumstances outlined, and the Y.M.C.A. had appealed.

In affirming the decree of the circuit court and holding that the property was subject to taxation, the court said, 1.c. 237:

"Two of the cases cited by respondent (Taylor v. Lebeaume, 17 Mo. 338; and Fitterer v. Grawford, 157 Mo. 51) furnish very strong support for the decree of the circuit court. The ruling in the Fitterer case (157 Mo. 51) is a construction of our present Constitution and statute, and holds that a building owned by a Masonic lodge, on account of the charitable designs and practices of such lodge, is exempt from taxation, so long as it is used exclusively

for such lodge purposes, but when two of the floors of such building are rented for commercial purposes then the entire building becomes subject to taxation. In deciding that case it was said: There is a very material difference between the "use of a building exclusively for purely charitable purposes, " and renting it out, and then applying the proceeds arising therefrom to such purposes. To rent out a building is not to use it within the meaning of the statute, but in order to use it, it must be occupied or made use of. Moreover, by leasing the property the lodge becomes the competitor of all persons having property to rent for similar purposes, and the plain and obvious meaning of the statute is that such property shall not be exempt from taxation. " "

The last expression of the Supreme Court of Missouri is found in Evangelical Lutheran Synod, etc. v. Hoehn, 196 S.W. (2d) 134 Mo., 1.c. 143:

"The prerequisites to tax exemption were:
(1) the use of the land itself, not merely
its usufruct, for those exclusive purposes;
(2) the owner must be dedicated to those
purposes. To that extent the ownership
characterized the use. If the first were
not true, a proper religious or charitable
institution could have claimed tax exemption
if, for instance, its real estate was merely
rented out and the rentals devoted to its
objectives — which is not the law. * * *

In speaking of the Y.M.C.A. opinion, supra, our Supreme Court in the case of Y.M.C.A. v. Baumann, 130 S.W. (2d) 499, 1.c. 501 said:

" * * * * the proof showed that a portion of the Association's building was leased to others for commercial purposes. We denied exemption because the property itself was not used 'exclusively' for educational and religious purposes and further held that it was immaterial that the income from the property was so used.

This office has on at least three occasions had some variation of this question before it for opinion and has uniformly held that if the parsonage is not being occupied by the minister, but has been used to produce income by renting it out, that it is no longer being used exclusively for religious worship or charitable purposes, even though the income derived therefrom is devoted to such purposes.

In an opinion dated May 4, 1943, addressed to Mr. Henderson, Prosecuting Attorney, Shelbina, Missouri, this office said: "If the minister lives in the building sought to be exempted from taxation, then it is exempt because it is being used for religious worship or for purposes purely charitable. However, if it is rented and used for a residence by persons other than the minister, then it " " " is not exclusively used for religious worship or purposes purely charitable even though the rentals go for this purpose. "

The conclusion in the above opinion was that the church would have to pay taxes for that period of time during which the parsonage was rented out. All of the cases and opinions hereinbefore cited and set out were decided under the provisions of Sec. 10937 R.S. Mo. 1939, but as mentioned before that statute is substantially the same as the present one (Sec. 5, Laws of 1945, p. 1800) except for the addition in the new law of the expression beginning with "provided", which only serves to enact into law by statute what the courts of the state had already declared the law to be, namely - the purposesto which the income from the rented property is put are immaterial.

To sum up, then - a tax exemption is allowed on real property used regularly and exclusively for religious worship or for purely charitable purposes. A parsonage which has been rented out for private business purposes for three consecutive years is not in regular use for the aforesaid purposes. The decisions of the courts of this state and previous opinions of this office demonstrate the meaning of "exclusively" and the interpretation of the word "use". To rent out is not to "use" within the meaning of the statute and any use short of a total one is not exclusive. Further, both by court decision and now by statute, the law of this state is that the devotion of the entire income, derived from said renting out, to religious or charitable purposes will

Hon. Clyde E. Combs

not bring such property within the exemption statute.

In this state, property is assessed according to its ownership or control as of January 1 of each year. Laws of 1945, Section 17, Page 1762. Therefore the property in question should be taxed for the years 1947, 1948 and 1949. As you suggest, if the present use continues through January 1, 1950, the property would not be subject to tax for said year.

CONCLUSION

It is, therefore, the opinion of this office that a church parsonage which is being rented for the purpose of producing income, on the date it is assessed, is not exempt from taxation, and notwithstanding the fact that the income derived from such renting is devoted wholly to religious worship or charitable purposes.

Respectfully submitted,

H. JACKSON DANIEL Assistant Attorney General

APPROVED:

J. E. TAYLOR

Attorney General/

HJD:AN

INSURANCE DEPARTMENT: May employ actuary cointly with Public School Retirement System.

FILED 19

March 23, 1949

3.29

Hon. Bert Cooper Director, Department of Business-and Administration Jefferson City, Missouri

Dear Sir:

We have received your request for an opinion of this department, which request is as follows:

"The Insurance Division of the Department of Business and Administration has had no actuary since Alex Good died several months ago and is obliged to depend upon the services of out of town consulting actuaries.

"Due to a statutory limitation of \$5000 on salary, we have been unable to interest any suitable applicant. We now have an opportunity to join with the Public School Retirement System of Missouri and employ an actuary up to \$8000 per year. The Division of Insurance paying \$5000 payable monthly, and the Public School Retirement System paying remainder up to \$3000 additional, payable monthly. The actuary's office to be with the Insurance Division and he would do the work of the Retirement System when called upon to do so.

"1. Would such a plan comply with the laws of Missouri?

"2. If the answer to question one is yes, what specifications would you suggest for the contract?"

Section 5784, R. S. Mo. 1939, provides, in part, as follows:

"Said superintendent of insurance may appoint and employ an actuary, who shall be subject to removal at the pleasure of said superintendent. The salary of said actuary shall not exceed the sum of five thousand dollars (\$5,000.00) per annum, and shall be payable in the same manner as the salary of the superintendent of insurance; said actusry shall have had at least five years' experience in actuarial work. The duties of said actuary shall be those usually performed by actuaries and he shall further do such things connected with the department of insurance as he may be directed to do by the superintendent of insurance. All fees, allowed or paid to the actuary as provided by the laws of the state, shall be paid to the state treasurer in the same manner as other fees collected by the superintendent of insurance. * * *

Statutes pertaining to the Insurance Department make no requirement that such actuary devote his full time to his duties for that department.

The Public School Retirement System of Missouri was established by an act of the 63rd General Assembly, found in Laws of Missouri, 1945, at page 1353. Section 2 of that act contains the following provisions:

"(11) The board of trustees shall employ an actuary who shall be its technical adviser on matters regarding the operation of the retirement system, and shall perform such duties as are essential in connection therewith, including the recommendation for adoption by the board of mortality and other necessary tables, and the recommendation of the level rate of contributions required for operation of the System.

"(12) As soon as practicable after the establishment of the retirement system,

and annually thereafter, the actuary shall make a valuation of the System's assets and liabilities, on the basis of such tables as have been adopted.

"(13) At least once in the three-year period following the establishment of the retirement system, and in each five-year period thereafter, the board of trustees shall cause to be made an actuarial investigation into the mortality, service, and compensation experience of the members and beneficiaries of the system, and shall make any changes in the mortality, service, and other tables then in use which the results of the investigations show to be necessary."

No provision is made regarding the portion of his time which the actuary employed by the Public School Retirement System should devote to his duties for that agency.

In the absence of any statutory requirement that the actuary employed by the Department of Insurance or the Public School Retirement System devote his full time to his duties for each of said agencies, we perceive no legal objection to their employing the same person if, in the judgment of each of said employers, the person employed under such arrangement can properly carry out his duties for each of said employers. There would be no legal objection to his being paid the maximum salary permitted to be paid by the Department of Insurance to an actuary employed by it. No provision is made in the Public School Retirement System Act regarding the salary of the actuary employed by that agency. The fixing of his salary for his services for that agency is a matter to be determined by the trustees of the Public School Retirement System.

There is no statute prohibiting such an arrangement as you have suggested, and the common-law rule which forbids the same person from holding two inconsistent public positions would not be applicable. That rule, as set out in 46 C. J., Officers, Section 46, page 941, is that one person may not at the same time hold two inconsistent offices. "The inconsistency, which at common law makes offices incompatible, does not consist in the physical impossibility to discharge the duties of both offices, but lies rather in a conflict of interest, as where one is subordinate to the other and subject

in some degree to the supervisory power of its incumbent, or where the incumbent of one of the offices has the power to remove the incumbent of the other or to audit the accounts of the other." Although that rule may not affect the present question, in view of the fact that each of the positions in question is probably employment rather than office (46 C. J., Officers, Section 18, page 927), nevertheless there would be no such incompatibility in the two positions as that to which the common-law rule has reference. State ex rel. v. Bus, 135 Mo. 325, 331, 36 S.W. 636.

As for your question relating to the provisions to be inserted in the contract, public office or employment cannot be made a matter of contract. City of Springfield v. Clouse, 206 S. W. (2d) 539, 545(8). The Superintendent of Insurance must be free to exercise at any time the right conferred upon him by statute to remove at his pleasure any actuary employed by him. The details of the method by which the time of the actuary is to be divided between the Department of Insurance and the Public School Retirement System must be determined by the Superintendent of Insurance and the trustees of the Public School Retirement System.

Conclusion.

Therefore, it is the opinion of this department that the Division of Insurance and the Public School Retirement System may jointly employ an actuary, and such actuary may be paid by the Division of Insurance the maximum amount of \$5,000 per year, provided by Section 5784, R. S. Mo. 1939, and may receive in addition such salary from the Public School Retirement System as the trustees of that agency may determine.

Respectfully submitted,

APPROVED:

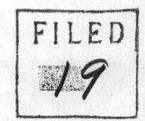
ROBERT R. WELBORN Assistant Attorney General

J. E. TAYLOR Attorney General

RRW:ml

ADMINISTRATION: Allowance for claim for tombstone is in second class.

June 9, 1949



Mr. Tom Coppage
Assistant Prosecuting Attorney
Greene County
Springfield, Missouri

Dear Sir:

This office is in receipt of your recent request for an official opinion. Your request is stated in the following terms:

"On Page 90 Laws of Missouri, 1917, appears Section 1 relating to purchase of tombstone by executor or administrator. On Page 97 of the same Session Acts appears Section 190 relating to classification of demands against estates of deceased persons. This is our present law in regard to classification of demands and the provisions in regard to second class demands are clearly in conflict with the provision of Section 1 mentioned above. We have been unable to find out if said section has been repealed though we feel that such must be the case since it does not appear in the Revised Statutes, Missouri, 1939."

You are correct in your deduction, as set forth above, that there is a conflict between Section 1, page 90, Laws Missouri 1917, and Section 190, page 97, Laws Missouri 1917, inasmuch as Section 1 places the cost of a tombstone in the fifth class and Section 190 places this cost in the second class.

I would call your attention in this respect to Section 1, page 99, Laws Missouri 1919. This section, as you will note upon examination (I do not quote it in its entirety because the greater part of it is immaterial to this issue) lists a great many sections of laws which are by Section 1 repealed. The concluding words of this section are: "and also an act approved April 9, 1917, as set forth on page 90 of Session Acts of 1917, be, and the same are, hereby repealed." Inasmuch as Section 1, page 90, Laws 1917, was approved

April 9, 1917, and inasmuch as it is the only section on the aforesaid page relating to administration there can be no question but that Section 1, page 90, Laws 1917, was repealed by Section 1, page 99, Laws 1919, and that that portion of Section 1, quoted above, refers to Section 1, page 90, Laws 1917.

CONCLUSION

It is the conclusion of this department that Section 1, page 90, Laws 1917, was repealed by Section 1, page 99, Laws 1919.

It is the further conclusion of this department that Section 190, page 97, Laws 1917, is the law in Missouri today governing the classification of the cost of a tombstone.

It is the further conclusion of this department that there is no conflict existing in the laws of Missouri regarding the classification of the cost of a tombstone.

Respectfully submitted,

HUGH P. WILLIAMSON Assistant Attorney General

APPROVED:

J. E. TAYLOR Attorney General

HPW:mw

* STATUTES INITIATIVE REFERENDUM j Effective date of act suspended upon filing of referendum) petition, and such suspension is not affected by a suit) to test propriety of referendum.

October 19, 1949

10/24/49

Mr. Ralph E. Copher Collector of Revenue Department of Revenue Jefferson City, Missouri



Dear Sir:

We have received your request for an opinion of this Department, which request is as follows:

"The present session of the Legislature by enacting House Bill 185 raised the gasoline tax rate from two cents to four cents, effective as of October 14th.

"Since the enactment of this law, referendum petitions have been filed. Also, a suit has been filed questioning the right of the petitioners to file petition in such cases. The question now arises as to our status in the collection of the increased rate.

"Will you please advise at your earliest convenience the position our Department should take in the collection of tax under the existing circumstances."

Section 52 of Article 3, Constitution of 1945, provides for referendum on acts of the Legislature as follows:

"A referendum may be ordered (except as to laws necessary for the immediate preservation of the public peace, health or safety, and laws making appropriations for the current expenses of the state government, for the maintenance of state institutions and for the support of public schools) either by petitions signed by five per cent

of the legal voters in each of two-thirds of the congressional districts in the state, or by the general assembly, as other bills are enacted. Referendum petitions shall be filed with the secretary of state not more than ninety days after the final adjournment of the session of the general assembly which passed the bill on which the referendum is demanded.

"The veto power of the governor shall not extend to measures referred to the people. All elections on measures referred to the people shall be had at the general state elections, except when the general assembly shall order a special election. Any measure referred to the people shall take effect when approved by a majority of the votes cast thereon, and not otherwise. This section shall not be construed to deprive any member of the general assembly of the right to introduce any measure."

(Emphasis ours.)

According to our information, the Secretary of State has accepted the petition filed with him as sufficient under the constitutional provision above quoted. The suit to which you refer in your letter is a petition for injunction which has been filed in the Circuit Court of Cole County, Missouri, by three taxpayers against Walter H. Toberman, Secretary of State, asking that the Secretary of State be enjoined from accepting the referendum petitions, and from certifying a copy of said petition to the Attorney General for the preparation of a ballot title, and from performing certain other acts looking toward an election pursuant to said petitions. The petition for injunction alleges that House Bill No. 185 is an act which is not subject to referendum, because it is a law making appropriations for the maintenance of state institutions; because it is a law making appropriations for the current expenses of the state government; and, because it is a law necessary for the immediate preservation of the public peace, health or safety.

The Supreme Court of Missouri, in the case of State ex rel.
Kemper v. Carter, 257 Mo. 52, 165 S.W. 773, considered the effect
of the filing of a petition for referendum upon the effective date
of an act of the Legislature. The constitutional provision then
in effect (Section 57, Article 4, Constitution of 1875) contained
the same provision found in Section 52, Article 3 of the Constitution of 1945, to-wit: "* * *Any measure referred to the people
shall take effect and become the law when it is approved by a
majority of the votes cast thereon, and not otherwise." In the
course of its opinion the court stated, 257 Mo., 1.c. 70:

"When we consider the primary object of the adoption of the referendum and have regard to the evils which its friends had in mind to correct by it, any view other than that it suspends the taking effect of the act against which it is invoked till a vote be had is illogical and well-nigh unthinkable. The fact that the people of the State reserved to themselves the right to say whether an act of the Legislature should ever become an effective law, is accentuated, as a major premise in the very forefront of section 57, and in what we may with a bit of aptness call the 'ordaining clause.' For observe that this section says: 'But the people reserve to themselves power . . . at their own option to approve or reject at the polls any act of the legislative assembly.' Further along in the section our organic referendum law pertinent to this question also says: 'Any measure referred to the people shall take effect and become the law when it is approved by a majority of the votes cast thereon and not otherwise. (Italics are ours.) Can there be two minds that this language has specific reference to the time of the taking effect of an act of the Legislature touching which the referendum provisions of the law and the Constitution have been invoked? Can there be any, the remotest doubt that likewise this clause means what it says?"

The court further stated at 1.c. 73:

"Aside from these most persuasive cases from other jurisdictions, by our own construction, of section 57 of article 4 of

our Constitution, as amended in 1908, we feel constrained to hold, without doubt or hesitation, that all acts of the Legislature touching which the referendum may be properly invoked, are suspended by the filing of a legal, sufficient and timely petition for the submission of such acts to a vote of the people for their approval or rejection, and that all such acts take effect when and only after a vote of the people has approved them at an election in which a majority of the votes are cast in favor of such act. * * *

We find no cases in this state in which the question has been presented as to the effect of the filing suit to test the propriety of a referendum on a particular act. In the case of Barkley et al. v. Pool, 102 Neb. 799, 169 N.W. 730, a petition for injunction was filed pursuant to statutory authorization to restrain the Secretary of State from certifying the sufficiency of a referendum petition. The court in its opinion considered the act as having been suspended, despite the filing of said petition for injunction. In the course of its opinion the court stated, 169 N.W., l.c. 731: "The ordering of a referendum suspends the operation of a law until approved by the voters."

We feel that a similar view would be taken by the courts of this state should the matter be presented to them. The Constitution clearly provides that an act which has been made the subject of a referendum petition shall not become effective until it has been approved by the voters. In this case, the petition on file with the Secretary of State is sufficient on its face and would, therefore, have the effect of suspending the effective date of the act in question.

CONCLUSION.

Therefore, it is the opinion of this department that the provisions of House Bill No. 185 of the Sixty-fifth General Assembly will remain suspended until a permanent injunction is finally granted prohibiting the Secretary of State from submitting such bill to a referendum or until approved by a majority of the votes cast at a referendum election for such bill.

Respectfully submitted,

MOBERT R. WELBORN Assistant Attorney General

APPROVED:

J. E. TAYLOR Attorney General SWAMP LANDS:

Indemnity Patent No.33 by State of Missouri dated January 3, 1878, conveying certain described land to Mississippi County, was effective to pass title to such land to Mississippi County.

May 13, 1949

2 58

Honorable Marshall Craig Prosecuting Attorney Mississippi County Charleston, Missouri



Dear Sir:

This is in answer to your letter requesting an official opinion of this department and reading as follows:

"Mississippi County owns the following described tract of land in Ripley County, Missouri, to-wit, the East Half (E) of the Southwest Quarter (SW1), Section 33, Township 24, Range 2.

"Title to this property was acquired under the swamp land legislation.

"The United States Department of Agriculture recently entered into a contract with the County to purchase the land. Certain objections to the title have arisen and these objections are set out in the enclosed letter dated June 21, 1948.

"As you will note, the Department of Agriculture has requested an opinion from your office concerning this title.

"I am also enclosing a copy of a letter from the Department dated September 9, 1948."

The letter signed by E. C. Hotchkiss, Attorney in Charge, states that the Solicitor of the Department of Agriculture believed that the conveyance by the state of this property to Mississippi County was invalid because it was unauthorized by Sections 12752 and 12780, R. S. Mo. 1939. Such sections have reference to swamp land in Missouri and read as follows:

"Sec. 12752. In order to provide for the reclamation of all overflowed and swamp lands which were granted to the state of Missouri for that purpose by an act of congress, entitled 'An act to enable the state of Arkansas and other states to reclaim the swamp lands within their limits, approved September 28, 1850, all of said lands in this state are hereby donated to the counties in which they may be respectively situated, and shall be the absolute property of such counties for the purposes hereinafter designated; and the secretary of state is hereby required to furnish to the clerks of all the county courts a certified copy of the approved and corrected list of swamp lands in each county, whenever called on for such list by the said clerk or clerks."

"Sec. 12780. In order to convey to the different counties in the state of Missouri a complete title to all the swamp and overflowed lands which have been granted and patented to the state of Missouri by an act of congress, entitled 'An act to enable the state of Arkansas and other states to reclaim the swamp lands within their limits, " approved September 28, 1850, the secretary of state is hereby directed to prepare a patent or patents, embracing all the swamp or overflowed lands lying within the limits of the several counties of this state, conveying thereby all the title and interest of the state of Missouri in and to such lands, to the counties in which such lands may lie, and when such patents have been prepared as herein provided, they shall be presented to and signed by the governor of this state, attested by the secretary of state, and recorded by the secretary of state in his office."

We also note that in his letter, Mr. Hotchkiss quotes the original patent from the State of Missouri to Mississippi County as providing among other things:

> "'A special certificate numbered twentytwo and dated 28th day of January, 1876, has been issued by the Commissioner of the

General Land Office, authorizing the state of Missouri to locate the quantity of two thousand one hundred and thirty eight acres and forty four hundredths of an acre, as the indemnity contemplated by the second section of the aforesaid act of March 27th, 1868 (not previously referred to in this patent) entitled "Sands Swamp", the swamp and overflowed lands were donated to the several counties wherein they are situated."

The patent by the State of Missouri to Mississippi County in reality reads as follows:

(See photostatic copy attached.)

The act of March 2, 1855, referred to in the patent, is found 10 U. S. Statutes at Large, page 634, 43 U.S.C.A., Section 981, and provides that where lands that were "swamp lands" were purchased from the United States and the lands were located by warrant or scrip, the state is authorized to locate a like quantity of any of the public lands subject to entry at \$1.25 per acre or less in patents should be issued therefor.

Section 12775, R. S. Mo. 1939, referring generally to the Secretary of State, provides in part as follows:

> " * * * He is hereby authorized to obtain such proof from the various county courts as is necessary to secure the indemnity from the general government under the act of March 2, 1855, and is hereby authorized to employ assistants for the performance of the duties required of him in this article, subject to the approval of the governor. He shall receive all moneys, scrip or certificates of indemnity on account of swamp and overflowed lands sold by the government of the United States since the donation of such lands to the state of Missouri, and deposit the moneys or scrip so obtained in the state treasury, to the credit of the county in whose favor the same is drawn, and cancel all records in his office on which indemnity has been received. He shall locate all certificates of indemnity received as aforesaid in the name of the county in whose favor said certificate is drawn, making said location from sight or personal knowledge of the same, and deposit the certificate of said location in the state treasury,

subject to the orders of the respective county courts, and he shall immediately notify said county courts of all deposits made in conformity with this article."

We believe it to be clear that the indemnity patent issued by the State of Missouri, January 3, 1878, to Mississippi County was a conveyance not of "swamp land" but of land received by the state in favor of Mississippi County as indemnity for "swamp land" that had previously been patented by the United States in Mississippi County. We find nothing in any statute requiring that such "indemnity land" be located in the county to which such land is granted. Therefore, we believe that the patent issued by the State of Missouri to Mississippi County conveying the land in question was a good conveyance of the title of such land. We believe it unnecessary to pass on the conveyances first evidenced by a tax sale by Ripley County since it is a matter of departmental policy of the Department of Agriculture as to whether or not this would constitute such a cloud on the title as would preclude the department's purchase. We do not see, however, how Ripley County could have obtained title to this land since there is no patent of the United States to Ripley County conveying this land and since this land is obviously not "swamp land" because it is indemnity land for swamp lands previously entered. The principal objection as we understand it by the department has been that Mississippi County had no title to such property.

CONCLUSION

It is the opinion of this department that the East half of the Southwest quarter, Section 33, Township 24, Range 2, patented to Mississippi County by the State of Missouri by Indemnity Patent No. 33, under date of January 3, 1878, was by such patent properly conveyed to Mississippi County and that by such patent, title was vested in Mississippi County.

Respectfully submitted,

APPROVED:

C. B. BURNS, JR. Assistant Attorney General

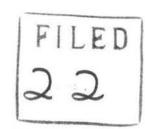
J. E. TAYLOR Attorney General

CBB:VIM

MAGISTRATES: COUNTY COURTS: OFFICERS: Judge of the county court may not serve as clerk of magistrate court.

January 20, 1949

Honorable W. A. Despain Prosecuting Attorney Shannon County Eminence, Missouri



Dear Mr. Despain:

This will acknowledge your request for an official opinion, which reads as follows:

"At the request of one of the Associate Judges of the County Court, I'm writing you for an opinion as to the eligibility, of an Associate and acting Judge of the County Court, serving as Clerk of the Magistrate Court, while serving in the capacity of County Judge.

"That is the now existing condition in this County, one of our associate Judges is the now acting and officiating Clerk of the Magistrate Court."

Your request poses the single question as to whether an associate judge of the county court of Shannon county, Missouri can hold that office while also qualifying and serving as clerk of the magistrate court of such county. The fact that the first office mentioned is elective in its nature and the second is appointive will not be of consequence when determining the question.

In the absence of direct or positive statutory prohibition against a judge of the county court qualifying and serving as clerk of the magistrate court in a county of the 4th class, to which class of counties Shannon county belongs, the common law rule must be stated as reiterated and adopted by the Supreme Court of Missouri in the case of State ex rel. Walker, Attorney General, v. Bus, 135 Mo. 325, wherein they stated at 1.c. 330: "The rule at common law is well settled that one who, while occupying a public office, accepts another which is incompatible with it, the first will, ipso facto, terminate without judicial proceeding or any other act of the incumbent. The acceptance of the second office operates as a resignation of the first. * * *"

The only inquiry remaining is whether the duties of the office of judge of the county court and those of the clerk of the magistrate court are so inconsistent and incompatible as to render it improper that the same person hold both offices at the same time. In admeasuring the inconsistent and incompatible nature of duties and liabilities attendant to the offices in question, the following rule must be kept in mind, the same being found stated in State ex rel. Walker, Attorney General, v. Bus, supra, at 1.c. 338,

"* * *At common law the only limit to the number of offices one person might hold is that they should be compatible and consistent. The incompatibility does not consist in a physical inability of one person to discharge the duties of the two offices, but there must be some inconsistency in the functions of the two; some conflict in the duties required of the officers, as where one has some supervision of the other, is required to deal with, control, or assist him."

We need only to examine the statute providing for payment of salaries of clerks of magistrate courts to find an incompatibility which would prove fatal to a design for the holding of the two offices being discussed by a judge of the county court of Shannon county, Missouri.

Section 21 of S.B. No. 94, passed by the 64th General Assembly of Missouri, Laws of Missouri 1947, Vol. 1, page 241, provides, in part, as follows:

"* *The total salaries of clerk, deputies and other employees paid by the state shall in no event exceed the annual amount fixed in this act for clerk and deputy clerk hire of such courts, provided, that in any county where need exists, the county court is hereby authorized, at the cost of the county, to provide such additional clerks, deputy clerks or other employees as may be required and to

provide funds for the payment of salaries or parts of salaries of clerks, deputy clerks and other employees, in addition to the amounts payable by the state under this act.* * *"

In an opinion rendered by this department under date of August 8, 1947, to Honorable H.L.C. Weier, prosecuting attorney of Jefferson county, Missouri, construing Section 21 of S.B. No. 94, supra, it was ruled that the salaries of the clerks of the magistrate courts could be increased by the county court beyond what is payable by the state, such increase to be paid by the county court out of county funds. Having ruled that the county court has discretionary power to increase the salary of a clerk of the magistrate court over the amount paid by the state, such increase to be paid out of county funds, it necessarily follows that if the judge of the county court of Shannon county is also serving as clerk of the magistrate court in said county, he would then be in a position to vote to raise his own salary as such clerk of the magistrate court. No clearer example could be made outlining the incompatibility of offices than we have in this instance. The facts bring this case clearly within the rules stated in State ex rel. Walker v. Bus, supra, and it is not necessary to delve further into the jurisdiction, powers and duties of the county court of Shannon county which make it so necessary to keep the membership of the county court from assuming duties connected with other offices, elective or appointive.

CONCLUSION

Therefore, it is the opinion of this department that an associate judge of the county court of Shannon county, Missouri is not eligible to serve as clerk of the magistrate court of such county and such service would be against public policy and his appointment would be invalid.

Respectfully submitted,

JULIAN L. O'MALLEY
Assistant Attorney General

APPROVED:

J. E. TAYLOR Attorney General May 23, 1949

5249

Honorable W. A. Despain Judge of the Probate Court Shannon County Eminence, Missouri



Dear Sir:

Your letter at hand requesting an opinion of this Department in which you inquire as to the qualifications of the clerk of the Magistrate and Probate Court, who apparently is the clerk of both courts.

Section 17 of the Constitution of 1945, Article V, in part, provides:

"Probate courts shall be courts of record and uniform in their organization, * * *"

Section 19, Laws of Missouri, 1945, page 774, in part, provides that, "Magistrate courts shall be courts of record. * * *" It is, therefore, apparent from the language of the Constitution and the quoted statute that both the Probate Court and Magistrate Court are courts of record.

Section 21, Laws of Missouri, 1945, page 775, in part, provides:

"In all counties each magistrate shall by an order duly made and entered of record appoint and fix the salary of a clerk of his court and may appoint such deputies and employees as may be necessary for the proper dispatch of the business of his court and fix their salaries at such sum as in his discretion may seem proper.

* * All such clerks, deputies and employees shall serve at the pleasure of the magistrate.

Each clerk of the magistrate court shall take the oath required of other clerks of courts in this State. Before entering upon the duties of his office, the clerk and deputy clerk shall enter into a bond to the State of Missouri, which

good and sufficient sureties, to be approved by the magistrate, in the sum of \$1,000.00, conditioned that he will faithfully discharge all of the duties of his office; which bond shall be filed and recorded in the office of the county clerk of the county. * * *

From the above section it appears that the clerk of the Magistrate Court is appointed by the magistrate and serves at his pleasure. The section goes on to provide for the taking of the oath and supplying the required bond.

In reading your request, you seem to be particularly concerned over the fact that the clerk you now have is under the age of twenty-one years, and because of this, there is some doubt in your mind that she is qualified for the office.

Article 1 of Chapter 92 of the Revised Statutes of Missouri, 1939, generally relates to clerks of courts of record which would encompass the clerks of the Magistrate and Probate Courts in view of the fact that they are courts of record. Section 13269 of this Article, in part, provides:

"No person shall be appointed or elected clerk of any court, unless he be a citizen of the United States, above the age of twenty-one years, * * *"

Consequently, in reading the above quoted section as set out, it is apparent that as a requirement or qualification for the office of clerk of the Magistrate Court or Probate Court, such person holding said office must be over twenty-one years of age, and such being the case, if the clerk of your court does not meet the age requirement as set out in the statute, she would not be qualified for the office.

As to the requirement of the bond where one person acts as the clerk of the Magistrate Court and clerk of the probate Court, I enclose a copy of an opinion previously submitted by this Department to the Judge of Probate Court of Perry County; and you will

note in reading this opinion that where one person serves as clerk of both courts that two bonds are required.

CONCLUSION.

It is therefore our opinion that regarding the qualification as to age of the person holding the office of clerk of the Magistrate Court and clerk of the Probate Court, that such person must be over twenty-one years of age.

Respectfully submitted,

APPROVED:

RICHARD F. THOMPSON Assistant Attorney General

J. E. TAYLOR Attorney General

RFT/few

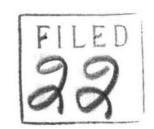
PUBLIC OFFICERS)
SHERIFFS
CIRCUIT JUDGES

Approval by circuit judge of deputy sheriff appointment is discretionary. Mandamus will lie to correct abuse of this discretion.

July 25, 1949

Filed: #22

Honorable T. W. Dempsey House of Representatives Sixty-Fifth General Assembly Jefferson City, Missouri



Dear Sir:

Your recent opinion request reads in part as follows:

"I would like to have an official opinion on the following case.

"Shortly after the general election in 1948, the Sheriff of St. Francois County gave Mr. Paul Berry a commission to act as a peace officer at a roadhouse on highway #61, five miles north of Farmington, three or four nights a week. This commission only applied to his duties as a peace officer at this particular place of business. However N. D. Houser of the 27th Judicial Circuit, refuses to certify the commission for Mr. Berry; * * "

Though you have failed to state specifically the questions which you desire to be answered in this opinion, we assume them to be (1) whether or not a circuit judge is required by law to approve all deputy sheriff appointments made by the sheriff; (2) whether or not the failure to approve in this instance was proper; and (3) if improper, what remedy is available.

Since the deputy sheriff in this instance is appointed to assist the sheriff in the discharge of his duties relative to the enforcement of the criminal law, his appointment is authorized by Section 1 of House Bill No. 899, Laws of Missouri, 1945, page 1562, which reads as follows:

"The sheriff in counties of the third class shall be entitled to such number of deputies and assistants, to be appointed by such official

with the approval of the judge of the circuit court, as such judge shall deem necessary for the prompt and proper discharge of his duties relative to the enforcement of the criminal law of this state. The judge of the circuit court, in his order permitting the sheriff to appoint deputies or assistants, shall fix the compensation of such deputies or assistants. The circuit judge shall annually, and oftener if necessary, review his order fixing the number and compensation of the deputies and assistants and in setting such number and compensation shall have due regard for the financial condition of the county. Each such order shall be entered on record and a certified copy thereof shall be filed in the office of the county clerk. sheriff may at any time discharge any deputy or assistant and may regulate the time of his or her employment."

(Emphasis ours.)

It is specifically provided that the appointment of deputy be made by the sheriff with the approval of the Circuit Judge. If this approval be a mere ministerial duty on the part of the circuit judge, he would be required as a matter of course to approve all appointments made by the sheriff. However, we are of the belief that this approval is discretionary rather than ministerial in nature, and therefore the circuit judge is not required by law to approve all appointments.

Whether or not the word, "approval" contemplates a ministerial or discretionary act must be ascertained from the language of the statute which authorizes that approval. See Better Built Homes and Mortgage Company v. Nolte, et al., 211 Mo. App. 601, 249 S.W. 743; Baynes v. Bank of Caruthersville, 118 S.W. (2d) 1051. Section 2, supra, not only provides for the circuit judge's approval of the sheriff's appointment, but also permits him to fix the compensation to be paid the deputy as well as to allow such number of appointments as he shall deem necessary to be made. The circuit judge is also given the power to review annually or as often as necessary his order fixing the number and compensation of deputies. These latter duties undoubtedly demand discretionary action, which implies that the approval of the sheriff's appointment is likewise to be discretionary with the circuit judge.

This view is substantiated by the case of State ex rel. Pilkington v. Busch, 198 S.W. (2d) 1004, where a circuit judge would not approve an appointment of a deputy prosecuting attorney made by the

prosecuting attorney. There was a statute involved which provided that the appointment was not to take effect until approved by the judge of the circuit court. At l. c. 1005, the Supreme Court of Arkansas said:

"The legislature did not intend that the duty imposed on a circuit judge in connection with the appointment of a deputy prosecuting attorney should be a merely formal or iministerial one. The word 'approved,' as used in the statute, connotes the exercise of discretion on the part of the judge.

"The very act of approval, unless limited by the context of the statute providing therefor, imports the act of passing judgment, the use of discretion and a determination as a deduction therefrom. * * * "

Since the approval of the circuit judge is a matter lying entirely within his discretion, he cannot be controlled in any manner in the exercise of this discretion. His action can in no way be questioned nor can he be compelled to exercise the discretion in any certain way.

However, should the circuit judge fail or refuse to exercise this discretion, that is, should he fail to approve or disapprove the appointment here under consideration, mandamus will lie to compel him to act and exercise his discretion in the matter. He will not be compelled to act in a certain manner, but will be ordered to take cognizance and perform his duty of exercising his discretion in the matter.

There is an exception to the rule that the action of a public official in a matter discretionary with him will not be interferred with, and that exception is stated in the case of State ex rel. v. Humphreys, 93 S.W. (2d) 924, 1. c. 926, 338 Mo. 1091:

" * * * * Mandamus will not lie to compel a person or officer to do something when action in the premises, on the part of such person or officer, is discretionary and not ministerial. State ex rel. Whitehead v. Wenom, 326 Mo. 352, 32 S.W. (2d) 59; State ex rel. Porter v. Hudson, 226 Mo. 239, loc. cit. 265, 126 S.W. 733; State ex rel. Pickering v. Willow Springs, 208 Mo. App. 1, 230 S.W. 352. But such discretion cannot be arbitrarily exercised, that is,

exercised in bad faith, capriciously, or by simple ipse dixit. When so exercised, it is regarded that there was no discretion, recognized by law, and in such case mandamus will lie. State ex rel. Adamson v. Lafayette County Court, 41 Mo. 221, 222; State ex rel. Kelleher v. Board of President & Directors of St. Louis, Public Schools, 134 Mo. 296, 35 S.W. 617, 56 Am. St. Rep. 503; State ex rel. McCleary v. Adcock, 206 Mo. 550, 105 S.W. 270, 121 Am. St. Rep. 681; State ex rel. Dolman V. Dickey, 280 Mo. 536, loc. cit. 552, 219 S.W. 363; State ex rel. First National Bank v. Bourne, 151 Mo. App. 104, 131 S.W. 896." (Emphasis ours.)

The reason for this rule is given by the court in the case of State ex rel. v. Lafayette County Court, 41 Mo. 221. In this case the county court was asked to approve the bond given by the relator who had been duly elected sheriff of Lafayette County. The approval of the bond was a matter lying within the discretion of the county court. The relator alleged that the court's action in refusing to approve the bond constituted an abuse of their discretion. The court at 1. c. 226 said:

" * * * When the law devolves upon an officer the exercise of a discretion, it is a sound legal discretion, not a capricious, arbitrary, or oppressive one. In a case like the one presented here, if this court has no jurisdiction the petitioner would stand in the anomalous attitude of a person having a clear specific right, and yet be entirely remediless by law. A hostile court could remove any sheriff in the State and vacate his office by declaring his bond insufficient, and arbitrarily refusing to hear any testimony in regard to the solvency and pecuniary responsibility of his sureties. If the County Court acts independent of all supervision, and its discretion is exclusive and uncontrollable, the result above indicated may follow, and there is no redress. It is true that the judges may be punished for malfeasance in office, but that furnishes no remedy to the person unjustly deprived of his rights. A discretion delegated to an officer is a sound legal discretion, the meaning of which is well known and understood in the law, and is not an unlimited license to the officer to act and do as he pleases, irrespective of restraint. * * *"

In State ex rel. v. Bowman, 294 S. W. 107, the court held that mandamus would lie to compel the members of the Board of Education of a consolidated school district to maintain a high school within such district. The maintenance of the high school was a matter lying within the discretion of the school board, but that board had abused that discretion and mandamus issued compelling them to maintain a high school in their school district. See also State ex rel. v. Board of President and Directors of St. Louis Public Schools, 134 Mo. 296, 35 S.W. 617, and State ex rel. v. Adcock, 206 Mo. 550, 105 S.W. 270, in which cases mandamus was utilized to correct abuses of discretion on the part of public officials and boards.

Therefore, where discretion has been abused by a public official, the court may interfere and mandamus will lie to compel him to act properly. It should also be pointed out that a court called upon to issue a writ of mandamus has a discretion in determining whether or not the writ shall issue, even when a prima facie right thereto is shown. However, here again a sound legal discretion in accordance with established rules of law is required.

Conclusion

Therefore, it is the opinion of this department that the approval by the circuit judge of deputy appointments made by the sheriff lies within the sole discretion of said judge. The exercise of this discretion will be interferred with only where there is clear proof of an abuse of this discretion. Mandamus will lie to correct such abuse of discretion.

Respectfully submitted,

RICHARD H. VOSS Assistant Attorney General

APPROVED:

J. E. TAYLOR Attorney General MAGIS RATE AND PROBATE COURT FEES:

County is liable to pay clerk's fees in magistrate cases where prosecuting attorney enters nolle prosequi; clerk's fees in probate court in sanity hearings of indigent insane; and attorney's fees for attorney

November 22, 1949

appointed by court to represent indigent insane at hearing. Duty of the Department of Revenue to collect these fees when county court refuses to pay them.

Mr. W. A. Despain Judge of the Probate and Magistrate Court Eminence, Missouri FILED 22

Dear Sir:

This office is in receipt of your recent request for an official opinion. Your request is expressed in your letter to this office as follows:

"In Re: Fees of Magistrate and Probate Clerk Fees, in counties of less than 30,000 population.

"Is the County liable for clerk's fees in Magistrate Court and Probate Court, in criminal cases where the Prosecuting Attorney enters Nolle prosequi?, also in insanity cases where the patient is ordered confined in some State Institutions?, also the payment of Attorney's fee where appointed by the Probate Court in insanity cases?

"If so, who should bring suit to collect Clerk's fees? as all clerks' costs are fees of the State and the clerk stands charged by the State for collection of said fees?"

For the purpose of greater convenience to us in considering these various matters we take the liberty of restating your request thus:

- "(1) Is the County liable for clerk's fees in Magistrate Court in criminal (misdemeanor) cases where the Prosecuting Attorney enters nolle prosequi?" (In your conversation with me at the time you presented your opinion request, you stated that you referred to misdemeanor cases.)
- "(2) Is the County liable for Clerk's fees in Probate Court in sanity cases (cases of indigent

insane) where the patient is ordered confined in some state institution?"

- "(3) Is the County liable for the payment of attorney's fees in sanity cases (indigent insane) where an attorney is appointed by the probate court to represent the alleged insane person in the sanity hearing."
- "(4) If the county is liable for the payment of the above fees, who should bring suit to collect clerk's fee, (assuming that a fee bill has been presented to the county court and that the court has refused to pay them, which you informed me verbally was the case) as all clerks' costs are fees belonging to the state, and the clerk stands charged by the state for the collection of said fees?"

We will now consider your first question, which is: Is the county liable for clerk's fees in the Magistrate Court in criminal (misdemeanor) cases where the prosecuting attorney enters nolle prosequi?

We believe that this question is fully answered by an official opinion rendered November 12, 1947, by this department, to Honorable Mark Wilson, Judge of the Magistrate Court of Henry County. We quote from that opinion:

"A further question presented concerns the liability for criminal costs in a case where a person is charged with a misdemeanor on information by the prosecuting attorney but said charge is dismissed by the prosecuting attorney before trial.

"Prosecutions before magistrates for misdemeanors are by informations made by the prosecuting attorney of the county in which the offense may be prosecuted. Upon the filing of an information by the prosecuting attorney it is the duty of the magistrate to forthwith issue a warrant for the arrest of the defendant. The filing of such an information has the effect of instigating a criminal prosecution. This was recognized by the Supreme Court in Ex Parte Bedard, 106 Mo. 616, 1.c. 622:

"!* * The determination of the question here hinges upon the scope and meaning of the words "Criminal prosecution," as used in section 4174, supra. We have no doubt they include a criminal information for a misdemeanor, * * *!"

"If, after the prosecution has commenced, the prosecuting attorney wishes to dismiss the charges brought against the defendant, he must enter a nolle prosequi. For the purpose of criminal costs statutes, a nolle prosequi is considered the same as if the defendant had been acquitted. We find this rule set out in the case of the State ex rel. Tudor v. The Platte County Court, 40 Mo. App. 503, at page 506:

"The sole question that was tried below, and is for trial here, is whether the county of Platte is liable for the costs arising under the above-mentioned indictment.

"The controversy is whether the state or county is liable for relator's costs and the case depends upon a construction of the criminal costs statute; and in passing on the question we shall consider the case as though the defendant had been acquitted. The nolle prosequi amounted to an acquittal in the sense of the statute."

We would call your further attention to the following section in Laws of Missouri, 1945, p. 750, (Sec. 3856.27 Mo. R.S.A. 1939:

"When the proceedings are prosecuted before any magistrate, at the instance of the injured party, for the disturbance of the peace of a person, or for libel or slander, or for any trespass against the person or property of another, not amounting to a felony, except for petit larceny, the name of such injured party shall be entered by the magistrate on his record as a prosecutor; and if the defendant shall be discharged or acquitted, such prosecutor shall be adjudged to pay the costs not otherwise adjudged; and in every other case of acquittal, if the magistrate

or jury trying the case shall state in the finding that the prosecution was mailicious or without probable cause, the magistrate shall enter judgment for costs against the prosecution or party at whose instance the information was filed, and shall issue execution therefor; but in no case shall the presecuting attorney be liable for costs. In other cases of discharge or acquittal the costs shall be paid by the county, except when the prosecution is commenced by complaint and the prosecuting attorney declines to file information thereon, in which case the proceedings shall be dismissed at the cost of the party filing the complaint."

Our answer to your first question is, therefore, that a county is liable for clerk's fees, which are criminal costs, in magistrate courts in counties of 30,000 population, or less, in criminal(misdemeanor) cases, where the prosecuting attorney enters nolle prosequi, except in such cases as costs are adjudged against the prosecutor, i.e., the complaining witness.

Your second question is: Is the County liable for clerk's fees in probate court in sanity cases (cases of indigent insane) where the patient is ordered confined in some state institution?

In answer to this question, we would call your attention to Section 453, Mo. R. S. A. 1939, which states:

"When any person shall be found to be insane according to the preceding provisions, the costs of the proceedings shall be paid out of his estate, or, if that be insufficient, by the county."

The case of Van Loo v. Osage County, 141 S.W. (2d) 805, states:

"* * *When a person is adjudged insane in the probate court, and the costs cannot be paid out of the estate of such insane person, then the county is liable for such costs, and the fact that the probate court committed Anna Van Loc to the state hospital at Fulton, instead of ordering her held for disposition by the county court, would not relieve the county of its duty to pay the costs." Our answer to your second question is, therefore, that the county is liable for clerk's fees in the probate court insanity cases, since they are part of the costs, in cases of indigent insane, where the person for whom the hearing is held is ordered committed to some state institution.

Your third question is: Is the county liable for the payment of attorney's fees in sanity cases where an attorney is appointed by the probate court to represent the alleged insane person at the sanity hearing?

In answer to this question we would direct your attention to Section 449, Mo. R. S. 1939, which states:

"In proceedings under this article, the alleged insane person must be notified of the proceeding by written notice stating the nature of the proceeding, time and place when such proceedings will be heard by the court, and that such person is entitled to be present at said hearing and to be assisted by counsel, such notice to be signed by the judge or clerk of the court under the seal of such court, and served in person on the alleged insane person a reasonable time before the date set for such hearing. If no licensed attorney appears for the alleged insane person at such hearing then the court shall appoint an attorney to represent such person in such proceeding and shall allow a reasonable attorney fee for the services rendered, same to be taxed as costs in such proceeding."

This section has been sustained in many cases, including State ex rel. Johnson v. Hagadon, 251 S.W. 131; Moberly v. Powell, 86 S. W. (2d) 383, and Hurst v. Cramer, 195 S.W. (2d) 738, all of which hold that all provisions of this section must be strictly complied with.

It is the opinion of this department, therefore, that the county is liable for the payment of attorneys fees in sanity cases where an attorney is appointed by the probate court to represent the alleged indigent insane at the sanity hearing.

Your final question is: If the county is liable for the payment of the costs in the three instances enumerated above (and we have held that the county is liable to pay these costs) who should bring suit to collect clerk's fees (assuming that fee bill

has been presented to the county court and that the court has refused to pay them) as all clerk's costs are fees belonging to the state, and the clerk stands charged by the state for the collection of said fees?

In connection with the above we would direct your attention to Section 13403.1, Mo. R.S.A., parts 2 and 3 of which state:

- "(2) In each criminal proceeding and in each preliminary hearing instituted in any magistrate court, a magistrate court fee of two dollars and fifty cents (\$2.50) shall be allowed and collected to be in full for the services of the magistrate or the clerk of said court. Such fees shall be charged, collected and disposition thereof shall be made as provided by law applicable thereto.
- "(3) All such fees shall be charged on behalf of the State or county paying salary of such clerk or magistrate and shall be paid and accounted for in the same manner as magistratesfees."

You will note that the above states that "all such fees * * *shall be paid and accounted for in the same manner as magistrates fees."

The payment and "accounting for" of magistrate fees, referred to above, is provided for in Section 2811.123, Mo. R.S.A., which states:

"A fee of five (\$5.00) dollars shall be allowed the magistrate in each civil proceeding, general or special instituted in his court. Upon the commencement of any such proceedings in the magistrate court except in cases instituted by the state, county or other political subdivision the party commencing the same shall pay to the clerk of said court such magistrate fee of five dollars (\$5.00). The fees herein provided shall be charged against the losing party, and if recovered from said party the same shall be repaid to the party making the deposit of such fee. Except as pro-vided in Section 23a of this act, it shall be the duty of each clerk of the magistrate

court, with the approval of the magistrate to charge upon behalf of the State every fee that accrues in his office and to receive the same, and at the end of each month, pay over to the director of revenue all monies collected by him as fees, taking two receipts therefor, one of which he shall immediately file with the state treasurer and shall at the end of each month make out an itemized and accurate list of all fees collected by him, or by the magistrate, giving the name of the person or persons paying the same, and turn the same over to the director of revenue. said report to be verified by affidavit. On or before the 31st day of January of each year the clerk of the magistrate court shall file a verified report with the director of revenue showing all fees due and unpaid in his office in cases where the liability therefor has been finally determined and established during the preceding year, showing the name of the person or persons owing same and stating that he has been unable, after the exercise of diligence, to collect the same. The director of revenue shall collect such unpaid fees and shall have the same rights in connection with the judgment therefor as the prevailing party in the litigation.

"All magistrate fees received by the director of revenue shall be deposited by him with the state treasurer in a special fund to be denominated 'magistrate fund', and all moneys in said fund shall be used exclusively for the payment of salaries of magistrates, their clerks, deputies and employees and for the payment of the cost of any surety bonds furnished by a clerk or deputy clerk; provided, however, that such salaries may also be paid from the general revenue of the state whenever either the balance in the magistrate fund or the appropriation from such fund is insufficient to pay such salaries."

Section 23a referred to above is now 2811.123a, and relates to the appointment of additional magistrates by the circuit judge and is therefore not pertinent to the issues before us in this instance.

It will be recalled that section 13403.1, quoted above, related to magistrate clerk's fees in criminal cases. It stated that "all such fees * * *shall be paid and accounted for in the same manner as magistrate fees." Also that Section 2811.123, quoted above, states that "on or before the 31st day of January of each year the clerk of the magistrate court shall file a verified report with the Director of Revenue showing all fees due and unpaid in his office in cases where the liability therefor has been finally determined and established during the preceding year, showing the name or names of the persons owing same and state that he has been unable, after the exercise of diligence, to collect the same. The director of revenue shall collect such unpaid fees and shall have the same rights in connection with the judgment therefor as the prevailing party in the litigation."

The answer to the first part of your final question would therefore be that the Director of Revenue of the State of Missouri shall have the duty of collecting unpaid fees due magistrate clerks.

It is our further opinion that unpaid fees due the clerk of the probate court in the case of an indigent insane hearing should also be collected by the Director of Revenue of the State of Missouri inasmuch as in counties of 30,000 population or less (which is the case here) all probate fees are to be paid over to the Director of Revenue, which pays the salaries of probate judges in such counties.

We would call your further attention to Laws of Missouri, 1945, page 1516, (Sec. 13404, Mo. R.S.A. 1939, and to that part of the aforesaid law which reads:

"In counties now or hereafter having 30,000 inhabitants or less, the judge or clerk of the court shall, at the end of each month, file with the director of revenue a written report, verified by his affidavit specifying the name and court number of each estate in which fees were paid during such month and at the same time pay over to the director of revenue, to be deposited by him with the state treasurer in the 'magistrate fund', all moneys collected by him or his clerk as fees, taking two receipts therefor, one of which he shall immediately file with the state

treasurer. Each judge or clerk of the court shall, within thirty days after the expiration of each calendar year file with such director of revenue a written report, verified by his affidavit specifying the name and court number of each estate in which fees accrued in his court in such calendar year, and the amount of fees unpaid and due in each estate at the end of such year. Such judge or clerk of the court shall also specify in said written report to the director of revenue all fees which have been due and unpaid for more than one year, the amounts thereof and the name of the estate in which the same are due, which report shall be verified by affidavit of the judge or clerk of the court that he has been unable after the exercise of diligence, to collect the same; and it shall thereupon be the duty of the director of revenue to cause the same to be collected by law and turned over to the state treasurer. " [Underscoring ours.]

It is the further opinion of this department that it is the duty of the Department of Revenue of the State of Missouri to collect these clerk's fees when the county court refuses to pay them.

CONCLUSION

It is the conclusion of this department (1) that the county is liable to pay clerk's fees in magistrate court in misdemeanor cases when the prosecuting attorney enters nolle prosequi; (2) that the county is also liable to pay the clerk's fees in probate courts in sanity hearings of indigent insane where the patient is ordered confined in a state institution; (3) and that the county is also liable to pay an attorney appointed by the probate court to represent an indigent insane at a sanity hearing; and (4) if said clerk's fees are not paid the Director of Revenue may enforce collection of the same after they are certifed to him as delinquent.

Respectfully submitted,

HUGH P. WILLIAMSON Assistant Attorney General

APPROVED:

J. E. TAYLOR Attorney General

HPW:mw

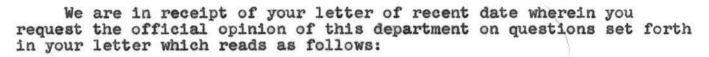
CRIMINAL CODE:

Postdated checks fall within the provisions of the Criminal Code, Sec. 4695, R.S. Mo. 1939. County Treasurers may not serve as Deputy Sheriffs.

January 7, 1949

Mr. William Lee Dodd Prosecuting Attorney Ripley County Doniphan, Missouri

Dear Sir:



"Suppose a man gives a postdated check and then fails to deposit the money in the bank to meet it, or fails to take it up by date. Is this a crime? Is it a promisory note?

Suppose a man gives a postdated check and says he will pick the check up by due date, or that he will make payments on it, but never does either one. Is this a crime?

Does the law permit a County Treasurer to act as Deputy Sheriff?"

Our attention is first directed to your inquiry relative to postdated checks. Section 3028, R.S. Mo. 1939, provides as follows relative to postdated checks:

"The instrument is not invalid for the reason only that it is antedated, or postdated: Provided, this is not done for an illegal or fraudulent purpose. The person to whom an instrument so dated is delivered acquires the title thereto as of the date of delivery."

The reading of the above quoted statute discloses that the giving of a postdated check may cause the same to be invalid if the purpose for which it is given is fraudulent or illegal.

In the Criminal Code of Missouri, Section 4695 R.S. Mo. 1939, the drawing of checks or drafts with intent to defraud has been designated a misdemeanor. The question then arises whether the giving of a postdated check would fall within the scope of such statute. In passing on this point, the Supreme Court of Missouri, ruling in the case of State v. Taylor, 73, S.W. (2nd) 378, 1.c.

-2-

1-6-49

382, 95 A.L.R. 476, 335 Mo. 460, spoke as follows:

"Nor is a postdated check outside the classes of instruments at which section 4305, R.S. Mo. 1929 * * * (Sec. 4695, R. S. Mo. 1939) is directed. Our Statute covers 'any check, draft or order, for the payment of money * * *."

(Words in parenthesis ours)

The ruling in State v. Taylor quoted above clearly brings the act of giving a postdated check within the misdemeanor statute, in those instances where intent to defraud can be established.

The second portion of this opinion is now addressed to your inquiry relative to the right of the County Treasurer of Ripley County, Missouri, to act as Deputy Sheriff under the duly elected and qualified Sheriff of such county.

Section 13799, R.S. Mo. 1939, provides as follows:

"No sheriff, marshal, clerk, or collector, or the deputy of any officer, shall be eligible to the office of treasurer of any county."

CONCLUSION

- This department is of the opinion that the giving of a postdated check is to be considered a crime within the misdemeanor statute, Sec. 4695, R.S. Mo. 1939, in those instances where intent to defraud can be established.
- This department is of the opinion that Section 13799, R.S. Mo. 1939 constitutes a positive prohibition against the Deputy Sheriff and Treasurer of Ripley County being one and the same office holder.

Respectfully submitted,

APPROVED:

J. E. TAYLOR Attorney General Julian L. O'Malley Assistant Attorney General

JLO'M: p/mlw

COUNTY BUDGET ACT: County court in counties of the 4th class may estimate tax moneys from all sources in arriving at budget.

January 19, 1949

2-1-49



Honorable William Lee Dodd Prosecuting Attorney Ripley County Doniphan, Missouri

Dear Sir:

Reference is made to your request for an official opinion reading as follows:

"In 1947 the Magnolia Pipeline Co. put a pipline through Ripley County to transport oil in interstate commerce, but the Missouri Tax Commission has not set the valuation on the pipeline and booster station. The county court, in preparing their budget for 1949 would like to include this pipeline and booster station in their estimate. They want to know if the law will permit them to estimate the valuation, basing it on two other pipelines in Ripley County, and put it in the budget for 1949? The taxes will come in in 1949, but unless it is put in the budget the county cannot spend it, but will have to apply it on old debts."

We note that in accordance with the classification of counties adopted by the 63rd General Assembly, pursuant to the requirement of the Constitution of Missouri of 1945, Ripley County has been assigned to the fourth class. Section 10919, Mo. R.S.A., relates to the preparation of the budget for counties of the fourth class among others. The act requires the county court in a county of the fourth class during the regular February term of such court in each year to prepare and enter of record and to file with the county treasurer and state auditor a budget of estimated receipts and expenditures for the then current calendar year. We find the following in said section, relating to the matters to be included in such budget estimates:

" * * * The receipts shall show the cash balance on hand as of January first and not obligated, also all revenue collected and an estimate of all revenue to be collected, also all moneys received or estimated to be received during the current year. * * * * "

(Underscoring ours.)

It seems that the underscored portion of the above quotation clearly authorizes the inclusion of revenue reasonably estimated to be received during the period for which such budget is prepared. It therefore follows that revenue reasonably to be anticipated from the source mentioned in your letter of inquiry could and should be included in the budget for your county for the calendar year 1949, based upon your statement that such taxes will be paid during that year.

CONCLESION

In the premises, we are of the opinion that a county court in a county of the fourth class may include in its budget for the calendar year 1949 a reasonable estimate of all tax revenue to be received by such county during said fiscal period.

Respectfully submitted,

WILL F. BERRY, JR. Assistant Attorney General

APPROVED:

J. E. TAYLOR Attorney General

WFB:VLM

HEALTH - RULES:

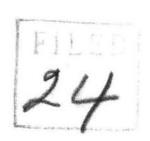
Rules of Division of Health concerning sewage

systems are valid.

SEWAGE:

Injunction is a proper remedy to prevent a municipality from creating a public nuisance.

March 10, 1949



Hon. Wm. Lee Dodd Prosecuting Attorney Ripley County Doniphan, Missouri

Dear Sir:

This will acknowledge receipt of your request for an opinion of this office, which we restate as follows:

- 1. Must a city obtain approval from the State Department of Health before it can extend its sewer system?
- 2. May an injunction be obtained to prevent an extension of a sewage system so as to create a public nuisance?

It is our understanding, from discussions with the officials in the Environmental Sanitation Department of the Division of Health of the State of Missouri, that the Division refuses to approve the plans for the extension of the sewer system of the city of Doniphan because there is no provision for sewage treatment before it is allowed to enter the Current River. It is the position of these health officials that the increased amount of sewage which will thus be disposed will so pollute the Current River that the health and safety of persons below the sewage outlet will be endangered.

The General Assembly provided, in Senate Bill No. 349 of the 63rd General Assembly, for a Department of Public Health and Welfare and within that department a Division of Health. Section 14 of Senate Bill No. 349, Laws of Missouri, 1945, page 949, provides as follows: "It shall be the general duty and responsibility of the division of health to safeguard the health of the people in the state
and all its subdivisions. It shall make a
study of the causes and prevention of diseases. It shall designate those diseases
which are infectious, contagious, communicable or dangerous in their nature and shall
make and enforce adequate orders and findings
to prevent the spread of such diseases and to
determine the prevalence of such diseases
within the state. * * * " (Underscoring ours.)

Section 13 of Senate Bill No. 349, supra, provides that all powers and duties heretofore under administration and control of the State Board of Health shall be assigned to the Division of Health.

The State Board of Health was created by an act of the Legislature in 1883. At that time the powers and duties of the Board were set out in Section 3 of the act creating the Board, and were as follows:

"It shall be the duty of the state board of health to safeguard the health of the people in the state, counties, cities, villages and towns. It shall make a study of the causes and prevention of diseases and shall have full power and authority to make such rules and regulations as will prevent the entrance of infectious, contagious, communicable or dangerous diseases into the state. It may send representatives to public health conferences when deemed advisable, and the expenses of such representatives shall be paid by the state as provided in this chapter for expenses of the members of the state board of health."

This statute has come down through the revisions in the same form as when originally enacted and is now Section 9735, R. S. Mo. 1939.

Present Section 9748, R. S. Mo. 1939, originally enacted in 1883, provides as follows:

"All rules and regulations authorized and made by the state board of health in accordance with this chapter shall supersede as to those matters to which this article relates, all local ordinances, rules and regulations and shall be observed throughout the state and enforced by all local and state health authorities. Nothing herein shall limit the right of local authorities to make such further ordinances, rules and regulations not inconsistent with the rules and regulations prescribed by the state board of health which may be necessary for the particular locality under the jurisdiction of such local authorities."

Present Section 9750, R. S. Mo. 1939, originally enacted in 1883, provides:

"Any person or persons violating, refusing or neglecting to obey the provisions of this article or any of the rules and regulations or procedures made by the state board of health in accordance with this article, * * * shall be guilty of a misdemeanor."

In 1919, present Section 9736, R. S. Mo. 1939 was enacted, which reads as follows:

"The board shall designate those diseases which are infectious, contagious, communicable or dangerous in their nature and shall make and enforce adequate rules, regulations and procedures to prevent the spread of those diseases and to determine the prevalence of said diseases within the state."

It is a rule of statutory construction that all statutes applicable to the subject involved must be read and construed together and effect must be given to each. Little River Drainage Dist. v. Lassater, 29 S. W. (2d) 716, 325 Mo. 493; State v. Naylor, 40 S. W. (2d) 1079, 328 Mo. 335.

In 1928 the State Board of Health adopted certain regulations which were compiled in book form in the Missouri Public Health Manual, Book 5. Part V of Book 5 of the Sanitary Code

contained regulations governing the installation, extension and operation of public sewage systems. Regulations covering sewage systems were filed with the Secretary of State in accordance with the requirements of the Constitution of Missouri, 1945, and are substantially the same as the regulations promulgated by the State Board of Health in 1928. The only change was the substitution of the term "Division of Health" for the term "State Board of Health." Prior to this filing the Division of Health filed with the Secretary of State a designation of diseases which are infectious, contagious, communicable or dangerous in their nature.

Thus, it is seen from the history of the Health Department of the State of Missouri that the power to make rules and regulations in matters concerning the public health and welfare of the people of the State is one of long standing. Likewise, it is obvious that rules and regulations pertaining to sewage disposal have long existed. In all but a few instances municipalities have co-operated with the Health Department in matters pertaining to water supply and sewage disposal. At this time it might not be amiss to point out that the Division of Health is co-operating with other organizations in a study of the problem of stream pollution, and the Governor of Missouri, in his message to the joint session of the 65th General Assembly on January 5, 1949, recommended that laws be passed in furtherance of a program leading to the prevention of pollution of streams in the state.

Many cases involving the powers of health boards have arisen in other jurisdictions. The case of State v. City of Juneau, 300 N. W. 187, was an action by the State of Wisconsin seeking a mandatory injunction to command the city of Juneau to comply with the orders of the State Board of Health and the State Committee on Water Pollution and asking that the city of Juneau be enjoined from discharging inadequately treated sewage into the drainage ditch. In its opinion the court said, l.c. 190, 191:

"" " " It is principally because municipalities are indifferent to the increasing
demands made upon them by our advancing
civilization in the field of education,
transportation and health that local bodies
have been so largely divested of power and
been made subject to legislative regulation
and supervision by state authority. The
case which we are considering is a glaring

instance of the disregard of public welfare in the interest of objecting taxpayers.

* * * * * * * * * *

"Under the provisions of ch. 144, neither the State Board of Health nor the State Committee on Water Pollution is obliged to postpone action until the health of a community is impaired or some citizen has died as a result of the pollution of the water of the state. The conditions which lead to such a result are well and scientifically known and the power of these bodies extends to prevention as well as to the remediation of conditions which are destructive of the public health.

"We find no basis for the contentions made by the appellant city that the State Board of Health and the State Committee on Water Pollution have acted beyond and without the powers conferred upon them by ch. 144. Under the statute the Board may order, where it appears that a municipality is cooperating, that the municipality may prescribe its own plan for abating the evil complained of (sec. 144.53 (4), but where, as here, there is entire lack of cooperation and active opposition, under the statute the Board is clearly empowered to prescribe definitely what shall be done. The legislature apparently assumed that when the fact that conditions deleterious to the health of the public were called to the attention of the local authorities, they voluntarily would proceed to remedy them." (Underscoring ours.)

One of the leading cases wherein the powers of the State Board of Health has been considered is Miles City v. Board of Health of State of Montana, 102 Pac. 696. In this case Miles City was preparing to extend its main sewer. The Board of Health held a hearing and determined that an extension of the outlet of the sewer system would produce an unsanitary condition and be dangerous to the health of persons residing below said Miles City. The Board further ordered and directed that the city, as early as practicable, dispose of the sewage of said city in some sanitary manner acceptable to the said Board

of Health. The city contended that it had acquired by prescription the right to discharge its sewage into the Yellowstone River. In considering this matter, the court said, 1.c. 698:

> " # # # Furthermore, the right which the state is attempting to assert through the agency of the State Board of Health is a public right - a right to protect the health of the people of the state - and as against such public right, prescription does not run. Commonwealth v. Moorehead, 118 Pa. 344, 12 Atl. 442, 4 Am. St. Rep. 599; 22 Am. & Eng. Ency. Law (2d Ed.) 1109. There is yet another reason why the city cannot acquire such a right by prescription as that against it the state may not invoke its police power. It is now generally conceded that the police power is such a power, inherent in the state for the protection of the public, that the state may not waive or divest itself of the power to exercise it. In re O'Brien, 29 Mont. 530, 75 Pac. 196; 8 Current Law, 36; Portland v. Cook, 48 Or. 550, 87 Pac. 772, 9 L. R. A. (N. S.) 733; 1 Abbott on Municipal Corporations, 209. It would seem to follow, then, as a matter of course, that notwithstanding the length of time the city has enjoyed the privilege of discharging its sewage into the river, the state may, in the interest of the public health and safety, regulate such use, or, if necessary, prevent the continuance of it. Indeed, if the state had consented to the use of the Yellowstone river by Miles City for the purpose of discharging its sewage therein, such consent would not have amounted to more than a license, which the state might revoke whenever public interests require it. Portland v. Cook, above."

The city further contended that the state did not produce any evidence in support of its order. The court, in holding that the city had the burden of showing that the order was not justified, said, ic. 698: " * * * This it might have done by showing
(a) that the sewage does not contain any
human excrement, and that without such excrement it is not of such character and
quantity as to pollute the waters of
Yellowstone river; or (b) that the sewage
had been rendered harmless by being subjected to some practical method of sewage
purification satisfactory to the State
Board of Health, or which ought to have
been satisfactory to such board. * * *"

In the case of Town of Meredith v. State Board of Health, 48 Atl. (2d) 489, the town of Meredith sought to restrain defendant Board of Health from enforcing certain regulations and orders requiring the plaintiff to install a suitable system of sewerage. The State Board of Health was organized under a statute which provided:

"'5. Duties. They shall take cognizance of the interests of health and life among the people; shall make sanitary investigations and inquiries concerning the causes of epidemics and other diseases, the sources of mortality and the effects of localities, employments, conditions and circumstances on the public health; shall advise and assist town health officers in making investigations into sanitary matters in their towns; and shall take measures to diffuse among the people such information on the subjects above named as may be useful."

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"'The state board of health shall have authority:

"'III. To make such rules and regulations as it may deem necessary for the administration of the provisions of the preceding paragraphs.'"

In the oral argument it was insisted that the State Board was nowhere given specific authority to deal with the subject matter of sewers and that therefore the orders directing the establishment of a sewer system were invalid. The laws of the

State of New Hampshire are somewhat broader in this respect than the laws of the State of Missouri in that they specifically provide that no person "shall construct any public system of sewage disposal, without first submitting to the state board and securing its approval thereof." The court cited other sections of New Hampshire law which tended to indicate a bestowal of authority with regard to the sewers upon the State Board. Thereafter, the court said, 1.c. 493, 494:

"These provisions all demonstrate the fallacy of the plaintiff's argument that the entire subject of sewers has been committed to the towns, and the state board of health thereby precluded from exercising any authority with reference thereto.

"Furthermore, if it were true, in fact, that the statutes of the State made no specific reference to sewers, we should have no hositation in holding that the maintenance of proper sewers is a subject necessarily within the field of operations of a board charged with the duty of taking 'cognizance of the interests of health and life among the people. R. L. c. 147, Sec. 5. It is inconceivable that by wholly failing to take action, any town can, with impunity, jeopardize the water supply and consequently the public health of a considerable portion of the State. Yet this is precisely what the plaintiff claims a legal right to do." (Underscoring ours.)

The case of Board of Purification v. Town of East Providence, 133 Atl. 812, was an appeal from an order of the Board directing the town "'to adopt, use and operate some practicable and reasonably available system or means to prevent" pollution of a river by the emptying therein of raw sewage. The order further required the submission to the Board of "'a plan or statement describing the system or means which said town of East Providence proposes to adopt."
This order was made in the year 1926. The court went on to recite that as early as 1921 the Board called the authorities of the town into conference in an attempt to stop pollution of public waters by the dumping of town sewage. Thereafter,

the Board repeatedly called into conference the officials of the town and, seeing no prospect of any immediate voluntary action by the town, took the above action. The town asked that the court consider the possibility that the town meeting would not vote the funds provided for carrying out the order, and if it did not, the town could not comply with the order of the Board. In this respect the court said, 1.c. 814, 815:

" # # # If the state has power to make the order, we shall not assume that the town will disobey it. In any event, difficulty of enforcement is not a valid argument for unconstitutionality. Nor is there merit in the claim that appellant is deprived of the equal protection of the law, or that the burdens of the state are not fairly distributed because the board has acted against the town of East Providence and not taken a similar action against the cities of Providence, Pawtucket, or Central Falls. East Providence is pol-luting the river. It is violating the statute. The board, after an extended display of patience, has seen fit to perform its prescribed duty 'to regulate or prohibit pollution of the waters of the state. In passing, we may observe that the evidence indicates that some attempts have been made by other cities to met the board's suggestions, and that the board has not given up the hope of amicably arranging matters with the other cities. In the case of East Providence, the evidence shows that the answer always has been that nothing can be done until the financial town meeting takes favorable action, and that such meeting always takes the position that conditions in the upper harbor at Providence are worse than in the Seekonk in East Providence, and therefore it will not act. What other cities have done or are doing, however, is entirely immaterial as far as the present order to East Providence is concerned. Such a defense, if good, would effectually block all attempts of the state to preserve and protect public health.

* * * * * * * * * *

" * * * After all the delay and disclaimers of personal responsibility by the town solicitor and the town council based upon inaction of the financial town meeting, the board was well warranted in ordering that definite action be taken to meet its ressonable demands. The financial town meeting cannot be permitted by past and suggested future inaction to pay no heed to the legitimate orders of the state. The board might have forbidden absolutely further pollution by raw sewage. Its orders are not vague. It intentionally left the handling of the local problems to East Providence. The board under the act could have specified a system. Under the circumstances it wisely preferred to. leave the system to the town. The action of the board from the start, instead of being arbitrary, has been indulgent."

The above case was followed in Board of Purification of Waters v. Town of Bristol, 153 Atl. 879.

The case of Department of Health of New Jersey v. City of North Wildwood, 122 Atl. 891, was one wherein the plaintiff asked for a mandatory injunction to order the defendant to cease pollution of waters by its sewage disposal system and to compel a different and proper sewage system. The city, for a defense, interposed that the cost of erecting a proper sewage disposal plant would exceed the legal limit of its bonded indebtedness. In disposing of this contention the court said, 1.c. 891:

"Clearly, to my mind, there is nothing in any of this which constitutes a defense to the bill. The Legislature has imposed upon defendant the obligation to do the very thing of which complainant prays this court do enforce the performance, and has provided that complainant may apply to this court for such enforcement. The mere fact that defendant cannot legally perform by means of issuing bonds does not show that it cannot legally perform at all. It has the taxing power wherewith to raise funds for the purpose; possibly also the power to do so by special assessment. * * *"

In the case of State Board of Health v. City of Greenville, 98 N. E. 1019, the State Board of Health entered an order reading as follows:

"That the city of Greenville should be required to purify its sewage in a manner satisfactory to the State Board of Health, on or before October 1, 1909."

The city sought to enjoin the State Board of Health from taking any steps or proceedings to enforce its order and from imposing or enforcing or causing to be enforced the fines, forfeitures and penalties provided by law. The State Board was acting under a statute which gave it the power to determine the need for improvements or changes necessary to abate a nuisance caused by cities or persons discharging sewage or other wastes into waters. In the course of its opinion the court said, 1.c. 1024, 1025:

"# # # Cities are no longer inclosed by stone walls and separate and apart from the balance of the state. The sanitary condition existing in any one city of the state is of vast importance to all the people of the state, for, if one city is permitted to maintain unsanitary conditions that will breed contagious and infectious diseases, its business and social relation with all other parts of the state will necessarily expose other citizens to the same diseases. But with the wisdom or folly of withholding from the local authorities final discretion over these matters. we are not concerned. It is beyond question the right of the General Assembly to do so, and the court need not, and ought not to, inquire what motive moved it in withholding such power.

"The disposal plant is for the benefit of the residents of the city. It is the primary duty of the city to provide for sanitary disposal of its sewage, and it is not in violation of any provision of the Constitution that it should bear the entire cost of erecting and maintaining a purification plant, and to require it to do so is not an arbitrary, unreasonable, or unfair exercise of the police power of the state. State ex rel. v. Freeman, 61 Kan. 90, 58 Pac. 959, 47 L. R. A. 67; State ex rel. Bulkeley v. Williams, 68 Conn. 131, 35 Atl. 24, 421, 48 L. R. A. 465.

* * * * * * * * *

"In this case it is apparent that the tax is levied for governmental purposes clearly within the powers of the General Assembly, notwithstanding it is especially for the needs and the benefits of the city of Greenville and is primarily for the corporate purposes of the city of Greenville. This fully appearing, it is not arbitrary or unfair to require the city to bear the burden and to conform to the orders and requirements of the State Board of Health by discontinuing the discharge of its sewage into a living stream and providing a proper disposal plant, so that the health of not only the citizens of the state residing in that city shall be preserved and protected, but of all the people in the state coming in business or social relation with them. The state would be powerless to perform this important function of government if the local officers were permitted to exercise their discretion in levying or refusing to levy a tax for that purpose."

The case of State ex rel. Shartel v. Humphries, 93 S. W. (2d) 924 (No. Sup.), was one wherein the State, at the relation of the Attorney General and the State Board of Health, as relators, proceeded in mandamus to compel Maplewood and Richmond Heights, and their officers, to do certain things respecting sewer outlet and connections, all for the purpose of abating a public nuisance.

In its petition the relator, State Board of Health, stated that it had endeavored to persuade the officers of said city to come to some agreement or plan to abate the nuisance caused by the overflow of sewage from sewers. After numerous conferences the city officials failed to agree on some plan, and thereafter the State Board of Health held a meeting and found "that the nuisance is a menance to the people of Missouri; * * that polluted water from seepage will affect persons coming in contact with it and cause typhoid

fever." The writ was issued, and upon appeal the judgment was affirmed.

In the case of State v. Curtis, 4 S. W. (2d) 467, the court said, 1.c. 469:

"Proper disposition of sewage is essential to public health, and the passage of laws making such possible is obviously a proper exercise of the police power. Morrison v. Morey, 146 Mo. 543, loc. cit. 562, 48 S.W. 629; Dillon on Mun. Corp. pars. 93-96; Cooley on Taxation (4th Ed.) 202. * * *

In the case of Riggs v. City of Springfield, 126 S. W. (2d) 1144, the Supreme Court of Missouri said, 1.c. 1153:

"Under no circumstances however would the city be privileged to create or maintain a public nuisance in the exercise of its use of the easement. The grant of power to a municipality to condemn for sewer purposes presumes a lawful exercise of the power conferred, and the authority to create a public nuisance will not be inferred. See Joyce on Nuisances, Sec. 284. The right of the city to empty its sewage into a stream or a river is merely a legislative license, revokable whenever the public health and safety require. Van Cleve v. Passaic Valley Sewerage Commissioners, 71 N.J.L. 183, 58 A. 571. Furthermore, the State Board of Health, under Section 9015, R. S. Mo. 1929, Mo. St. Ann. Sec. 9015, p. 4178, has imposed upon it the duty to safeguard the health of the people in the state, counties, cities, villages and towns. We recognize the fact that pollution abatement is a subject of national importance. President Roosevelt in a message to the Congress of the United States on February 15, 1939, devoted exclusively to this subject, said that while no quick and easy solution to the problem is in sight that many state agencies have forced remedial action where basic studies have shown it to be practical." (Underscoring ours.)

It has been pointed out above that the statutes creating the State Board of Health of Missouri, and subsequent enactments, have given the Division of Health the power and authority to promulgate rules and regulations to prevent the spread of infectious, contagious, communicable or dangerous diseases. Pursuant to this authority, the Division of Health has promulgated specific regulations covering the alteration to sewage works, as follows:

"Sec. 4. Submission of Plans for Alteration to Sewage Works - Every owner or his authorized agent, before making or entering into contract for making alterations or changes in, or additions to, any existing sewer system or sewage treatment plant shall submit to and receive the written approval of the Division of Health of complete plans and specifications fully describing such alterations, changes or additions, and thereafter such plans and specifications must be substantially adhered to unless deviations are submitted to and receive the written approval of the Division of Health.

"Sec. 7. Disposal of Sewage - No sewage shall be placed or permitted to be placed or discharged or permitted to flow into any of the waters or upon any of the lands of the state in any manner determined by the Division of Health to be prejudicially affecting a public water supply or causing a nuisance."

The Division of Health in promulgating the regulations set out above, as well as many others, is carrying out its general duty to safeguard the health of the people in this state and all its subdivisions. In the case of State v. Curtis, supra, the Supreme Court said that the proper disposition of sewage is essential to public health.

Missouri has adopted the rule that powers conferred on a health Board should receive a liberal construction. In the case of Hughes v. State Board of Health, 159 S. W. (2d) 277, the Supreme Court of Missouri said, 1.c. 279:

> " * * * it is a wholesome and wellrecognized rule of law that powers conferred upon boards of health to enable

them effectually to perform their important functions in safeguarding the public health should receive a liberal construction. * * * "

Therefore, we believe that it is within the power and authority granted the Division of Health to promulgate regulations concerning the extension of sewage systems. As will be seen later, since the Division of Health has authority to abate a public nuisance, so we believe it clearly within the scope of its authority to require municipalities and others to seek approval of their alteration plans so that public nuisances will not arise. By this we do not mean to say that the Division of Health may be arbitrary or capricious in approving plans for an alteration, and if a city is so aggrieved, it has its recourse to the courts.

In answer to the second question, we again point out that Section 9750, R. S. Mo. 1939, provides that any person or persons violating, refusing or neglecting to obey any of the rules or regulations made by the State Board of Health shall be guilty of a misdemeanor. Therefore, one method of procedure would be for the prosecuting attorney of the county to file against such persons under Section 9750, supra. Another method would be to file an injunction suit against the municipality before a court of equity for the purpose of abating a public nuisance. In State ex rel. Attorney General v. Canty, 207 Mo. 439, l.c. 456, 105 S.W. 1072, the court said:

"It never was the law, in the absence of legislative authority, that courts of equity could enjoin the commission of crime generally. (Crawford v. Tyrrell, 127 N. Y. 341.)

"This court has uniformly held that a court of equity has no jurisdiction to enjoin the commission of a crime, but that resort must be had to the criminal courts, which possess ample power to punish and prevent crime. (State ex rel. v. Schweickardt, 109 Mo. 496; State ex rel. v. Zachritz, 166 Mo. 307; State ex rel. v. Uhrig, 14 Mo. App. 413.)."

However, the court, disposing of the contention made by defendants, said, l.c. 459:

"The contention of respondents that a court of equity has no jurisdiction to abate a public nuisance where the offenders are amenable to the criminal laws of the State is not tenable, as is fully shown by the following authorities: 2 Story's Equity Jurisprudence (13 Ed.), secs. 923 and 924; Grawford v. Tyrrell, 128 N. Y. 341; People v. St. Louis, 48 Am. Dec. 340; 21 Am. and Eng. Ency. Law (2 Ed.), 704; Attorney-General v. Jamaica Pond. Aq. Corp., 133 Mass. 361; Carleton v. Rugg, 149 Mass. 550; Reaves v. Oklahoma, 13 Okla. 403."

In Attorney General v. Jamaica Pond Aqueduct Corp., 133 Mass. 361, a corporation chartered to supply fresh water to the public was enjoined from doing certain things which would constitute a public nuisance. At 1.c. 363 of 133 Mass. the court said:

"This information, therefore, can be sustained on the ground that the unlawful acts of the defendant will produce a nuisance, by partially draining the pond and exposing its shores, thus endangering the public health.

"The defendant contends that the law furnishes a plain, adequate and complete remedy for this nuisance by an indictment, or by proceedings under the statutes for the abatement of the nuisance by the board of health. Neither of these remedies can be invoked until a part of the mischief is done, and they could not, in the nature of things, restore the pond, the land and the underground currents to the same condition in which they are now. In other words, they could not remedy the whole mischief. The preventive force of a decree in equity, restraining the illegal acts before any mischief is done, gives clearly a more efficacious and complete remedy. Cadigan v. Brown, 120 Mass. 493."

In Board of Health of Lyndhurst, tp. v. United Cork Companies, 172 Atl. 347, 116 N. J. Eq. 4, affirmed Err. & App. 176 Atl. 142, 117 N. J. Eq. 437, operation of a cork factory producing conditions "hazardous to public health" was enjoined as a public nuisance, and, at l.c. 351 of 172 Atl., the court said:

"Nor is there any legal merit to the insistment that the public nuisance here assailed is not 'hazardous to the public health' and, therefore, neither cognizable nor enjoinable in this statutory proceeding, since no one has been shown to have actually become afflicted with disease as a result thereof. The fallacy of this contention is in the fact that it would make the statutory operation dependent upon the existence of actual injury instead of mere hazard."

At the same page, the court quoted with approval the following:

"'Manifestly, the law-making power did not intend to create a board of health with power to act only when and after they had watched the "source of foulness" from its beginnings and along its various grades of progression, until it has embraced the strong, debilitated the health, and prostrated the weak.'"

In the cases above cited the court was referring to a statute authorizing a board of health to maintain a suit for an injunction to abate a "nuisance hazardous to public health." This rule that a public nuisance hazardous to public health may be abated before actual injury occurs applies to a public nuisance in Missouri, because here even a threatened public nuisance may be abated by injunction.

In State ex rel. v. Canty, supra, the Supreme Court of Missouri followed this doctrine, 1.c. 457, 458 (207 Mo.):

"'A court of equity has jurisdiction to restrain existing or threatened public nuisances by injunction, at the suit of the Attorney-General of England, and at the suit of the state, or the people, or municipality or some proper officer representing the commonwealth, in this country.'

* * * * * * *

"They can not only prevent nuisances that are threatened, and before irreparable mischief ensues, but arrest or abate those in progress, and, by perpetual injunction, protect the public against them in the future; whereas courts of law can only reach existing nuisances, leaving future acts to be the subject of new prosecutions or proceedings. This is a salutary jurisdiction, especially where a nuisance affects the health, morals or safety of the community."

As to who may institute the action, the Missouri Supreme Court held in State ex rel. Lamb, 237 Mo. 437, 1.c. 455, 141 S. W. 665:

"Our conclusion is that the prosecuting attorney was authorized by law to institute a suit in the circuit court of Chariton county to enjoin, in behalf of the State, a public nuisance, and that he could proceed without giving bond.

In the case of State ex rel. Wear v. Springfield Gas & Electric Co., 204 S. W. 942, the court said, 1.c. 946:

"In the case at bar the position of the state is stronger than in the case of People v. Truckee Lumber Co., supra. because here the state is by statute the owner of the fish in Jordan and Wilson creeks, and by statute (section 1007, cited supra) the prosecuting attorney is directed to institute and prosecute all civil and criminal actions in his county where the interests of the state are concerned. We do not wish to be understood as indicating that we think that the authority to institute and prosecute a cause of the character with which we are now dealing is exclusively in the prosecuting attorney. Section 970, R. S. 1909, would, in our judgment, authorize the Attorney General to institute on

behalf of the state equitable proceedings to enjoin the destruction of fish in the manner set out in plaintiff's petition, not only on the ground that the state is the owner of the fish, and therefore concerned, but also on the ground that to pollute the streams of the state that are the habitation of fish is a public nuisance, and may be enjoined on that ground; there being property rights involved. State ex rel. Canty, 207 Mo. supra; Hamilton Brown Shoe Co. v. Saxey et al., 131 Mo. 212, 32 S. W. 1106, 52 Am. St. Rep. 622."

Also, in the case of State ex rel. Shartel v. Humphreys, 93 S. W. (2d) 924, the court said, 1.c. 927:

"The next question is: Did relators have authority to institute and prosecute this cause? The nuisance sought to be abated was a public nuisance, and a grievous one, and it also appears, as alleged, that the State Board of Health endeavored, without avail, to get Maplewood and Richmond Heights to agree upon some plan. Despairing of any relief by conference and persussion, the State Board of Health brought the matter to the attention of the Attorney General and this cause was filed. Section 9015, R. S. 1929, Mo. St. Ann. Sec. 9015. D. 4178, makes it the duty of the State Board of Health 'to safeguard the health of the people in the State, counties, cities, villages and towns, and under the facts here the Attorney General could have properly proceeded with or without joining as relator with the State Board of Health. Section 12276, R. S. 1929, Mo. St. Ann. Sec. 12276, p. 586; 46 C. J. 740; State ex rel. Crow v. Canty, 207 Mo. 439, 105 S. W. 1078, 15 L. R. A. (N.S.) 747, 123 Am. St. Rep. 393, 13 Ann. Cas. 787; State ex rel. Lamm v. City of Sedalia (Mo. App.) 241 S. W. 656; State ex rel. Detienne v. City of Vandalia, 119 Mo. App. 406, 416, 94 S.W. 1009." (Underscoring ours.)

In 39 C. J. S., Section 36, page 860, the rule is stated:

"Health authorities may maintain suits in equity to enjoin or restrain acts which are a menance to the health of the public, even before actual injury has been inflicted; indeed, this has been held to be the proper remedy where there is doubt as to the existence of a nuisance. * * * *

Therefore, we believe that an injunction suit would be a proper remedy to prevent a municipality from extending its sewer system so as to create a public nuisance.

Conclusion.

It is the opinion of this department that (1) since the Division of Health has promulgated valid rules and regulations under authority of law covering the extension of sewer systems, a city must obey these rules and regulations in making alterations thereto, and (2) a proper remedy to prevent a municipality from extending its sewer system so as to create a public nuisance is by injunction.

Respectfully submitted,

JOHN R. BATY Assistant Attorney General

APPROVED:

J. E. TAYLOR Attorney General

JRB:ml

AUCTIONEERS: COMMUNITY SALES: Person selling at auction at community sales barn required to have auctioneer's license.

May 12, 1949

Hon. William Lee Dodd Prosecuting Attorney Ripley County Doniphan, Missouri



Dear Sir:

We have received your request for an opinion of this department, which request is as follows:

"Sections 14912-14936, Revised Statutes of Mo. 1939, regulate auctioneers. We have one auctioneer in our county who auctioneers at a community sales barn every Thursday. At this sale he sells livestock coming from surrounding counties and sold in Ripley County, not the county of the owner's residence. He also sells livestock from this county as well. Do Sections 14912, 14924 and 14927 require the said auctioneer to have a license? Does the exception in Section 14927, i.e., sixth, mean that since he sells livestock from counties of owners not resident in this county, that he must have a license? Does the fact that he auctioneers at a community sale barn exempt him from a license requirement?"

The licensing of auctioneers is provided by Chapter 116, R. S. Mo. 1939, Sections 14912-14936. Section 14912 provides:

"No person shall exercise the trade or business of a public auctioneer by selling any goods or other property subject to duty under this chapter, or real estate, without a license." Sections 14914 to 14918 provide generally for the issuance of licenses.

Section 14919 provides the fees for licenses ranging from \$10.00 for ten days to \$75.00 for six months.

Section 14922 requires an applicant for an auctioneer's license to give a bond, conditioned upon the payment of all duty payable on property sold by him.

Section 14923 provides:

"Any licensed auctioneer may sell or retail goods at his auction store or rooms, so long as he continues the business of an auctioneer, without a license as vendor of merchandise, so that he render a true account of the sales and pay the like duty thereon as if such sales were made at auction."

Section 14924 provides:

"There shall be levied and paid upon the proceeds of the sales of all property at auction, except as hereinafter excepted, a duty to the state on the proceeds of all sales of personal property, except corporation stocks, one and a half per cent."

Section 14927 provides:

"Sales of property at auction shall be free of duty in the following cases: First, when directed by any statute of this state or of the United States; second, in executing any order, judgment or decree of any court or justice of the peace of this state or any court of the United States, in case of bankruptcy or insolvency, pursuant to any law of this state or of the United States; third, when sold by any trustee in conformity to a deed of trust to secure the payment of debts; fourth, property of deceased

persons sold by authority of executors or administrators; fifth, boats, vessels, rafts, lumber and other property wrecked, stranded or found adrift in any of the waters of or adjoining this state; sixth, live stock, agricultural productions. farming utensils and household and kitchen furniture sold in the county of the owner's residence; seventh, land or leasehold interest therein; eighth, each licensed merchant shall have the privilege of selling off, at auction, at the end of every twelve months after the commencement of his business, any refused stock of goods which he may have had on hand for six months preceding, without obtaining an auctioneer's license for that purpose."

Sections 14928 to 14936 relate to payment of duty and enforcement of the act.

Thus, it appears that licensing of auctioneers is, generally speaking, a matter related to the collection of revenue.

The Community Sales Law is found in Laws of Missouri, 1943, at page 310. Section 2(d) of the act contains the following definition:

"The term 'community sales' means any series of sales, exchanges, or purchases of any livestock made at regular or irregular intervals at an established place in this State, by any person, directly or indirectly, for or on account of the producer or producers, consignor or consignors thereof, at public auction or at private sale, except that this term shall not apply to established markets operating under Federal or State regulations, or to any public or private farm or purebred livestock sale."

Section 3 of the act provides:

"No person as defined in this act shall engage in the business of operating a

community sale unless duly licensed, as hereinafter provided."

Section 4 of the act provides for the issuance of licenses by the State Veterinarian upon payment of an annual fee of \$35.00.

Section 5 of the act authorizes the State Veterinarian to revoke or suspend licenses. The grounds for revocation relate generally to matters concerning the health of livestock offered for sale, sanitary conditions at the place of sale and accounting to the owners of the livestock sold.

Section 8 of the act requires a bond, conditioned upon the payment to the vendors of the proceeds of animals sold for him at such sales.

Section 15 of the act declared an emergency as follows:

"There is at present no law in this State regulating the sale, health or sanitation of livestock sold or moved through community sales and because of the fact livestock is a principal food item necessary to the health and protection of the State and Nation and because a law directly affecting the sanitation and health of livestock directly affects the production of same, it is hereby declared by the General Assembly that an emergency exists within the meaning of the Constitution and this act shall be in full force and effect from and after its passage and approval."

Thus, it appears that the Community Sales Law is primarily an exercise of the police power designed to protect the public as well as the persons whose livestock is offered for sale in such manner.

There is no constitutional limitation which prevents the state from levying upon one person two or more excise or license taxes for different purposes or pursuant to different powers of government. (Hertz Drivurself Stations, Inc. v. City of Louisville, 294 Ky. 568, 172 S.W. (2d) 207, 147 A.L.R. 306.) See Asotsky v. Beach, 319 Mo. 810, 58 S.W. (2d) 22, 62 A.L.R. 95.

In enacting the Community Sales Act, the Legislature did not make any express provision to the effect that a person holding a community sales license need not procure an auctioneer's license, nor can it be said that, in defining community sales to include sales at auction, did the Legislature, we feel, create an implied exemption from the Auctioneer's Licensing Law. The license as an auctioneer is required of the person engaged in such business without regard to the place in which the business is conducted. On the other hand, the licensee, under the Community Sales Act, may or may not be an auctioneer. If sales are conducted at auction, the Community Sales Act licensee may employ some other person to act as the auctioneer.

In view of such circumstances, and the further fact that the purposes of the two acts are wholly different, we feel that no implied exemption from the requirement of an auctioneer's license can be found in the Community Sales Licensing Act.

As for your inquiry regarding the effect of the sixth exemption in Section 14927, that has, we feel, no bearing upon the liability to obtain an auctioneer's license inasmuch as under Section 14912 a license is necessary, even though the sale at auction be of property exempt from duty under Section 14927.

Conclusion.

Therefore, it is the opinion of this department that an auctioneer at a community sales barn is required to have a license as an auctioneer under Chapter 116, R. S. Mo. 1939.

Respectfully submitted,

ROBERT R. WELBORN Assistant Attorney General

APPROVED:

J. E. TAYLOR Attorney General

RRW:ml

BURIAL ASSOCIATIONS: SUBMITTED FORM OF CONTRACT DISCUSSED: Form of contract submitted is not a policy of insurance on its face.

June 27 1949

Honorable William Lee Dodd Prosecuting Attorney Ripley County Doniphan, Missouri



Dear Sir:

We have your letter of April 29, 1949, in which you request an opinion of this department. Your letter is as follows:

"Please find enclosed a burial policy issued in Missouri and determine if it is in violation of the laws of Missouri."

The form of contract submitted for our examination is as follows:

"WITNESSETH: The second party purchases of the first party the following service, articles, and merchandise at the agreed value of...........Dollars, to-wit: removal of body, embalming, clothing,casket, outside box, hearse, and limousine, which the first part agrees and promises to deliver and furnish and perform according to the terms of this contract in Stoddard County or any County adjoining Stoddard County in the State of Missouri, at the death of

Name Age Payment Amt. Contract

through the facilities of:

"WATKING FUNERAL SERVICE, INC.

"IN CONSIDERATION of the promise and obligation of the first party hereby entered into, the second party, for and on behalf of himself, his heirs and administrators, agrees to pay to the first party the sum of \$...... to be paid in the following manner: In quarterly (three months) installments of not less than..........Dollars per quarter.

"Non-payment of any installment when due, shall be considered a breach of this agreement, and the first party shall not be obligated to perform. This contract, after default by the party of the second part, may be continued in full force and effect at the option of the first party.

"In event the second party has paid at least two quarterly installments in the amount above set out and then defaults in second parties payments, the first party agrees to credit the amount paid to the expense of the total contract price funeral when purchased from the first party for and on behalf of the second party.

"In event the second party dies outside of Stoddard County, or any County adjoining Stoddard County, if the body is returned to uny point in Stoddard County or any County adjoining Stoddard County, the first party will perform all the conditions of this contract. If, however, the body is not returned to Stoddard County, or any County adjoining Stoddard County, the first party will, on request of the second party, or his representative, ship to second party or second party's representative the casket and outside box specified above, or the first party will refund all money to party of the second part paid to first party on account of deceased under this contract at the option of the second party, or the representative of the second party.

"IN WITNESS WHEREOF, the parties hereto have executed this agreement in duplicate on the day and year first above written.

WATKINS FUNERAL SERVICE, INC. By: E. L. Watkins President

Attest:

H. R. Marsh Secretary

Witness

Party of the Second Part"

There is also appended to said form of contract a paper designated by its heading as "Application for Pre-Arranged Funeral Contract with Watkins Funeral Service, Inc., Dexter, Mo." The pertinent part of this paper reads as follows:

"I hereby make application for a PreArranged Funeral contract with the Watkins
Funeral Service, Inc. and by signing this
application, I, for value received promise
to pay to the Watkins Funeral Service, Inc.
at its office in Dexter, Missouri, or at
any other office of the Corporation \$.....,
each three months until I have paid \$.....,
the amount of this contract. The Corporation
agrees, that if no contract is issued, to
return the full amount paid with application."

We have considered your aforesaid letter and examined said form of contract. We have considered the question as to whether the submitted form is illegal in Missouri because it constitutes a policy of insurance issued by a corporation which has not complied with the insurance laws of the state as was true in the case of State vs. Black, 45 S.W. (2d) 406; or stated differently, whether or not this submitted contract, when fully executed, constitutes an insurance policy. With this question in view, we suggest the fact that on the face of the submitted form, there is nothing to indicate absolutely that the proposed contract is intended as an insurance arrangement.

The thing that the contract provides for is a payment of a stipulated funeral expense in installments payable every three months, and according to the terms and provisions of the contract, if the party of the second part should die immediately after the payment of his first installment, his estate would nevertheless be obligated to pay the remaining installments as they fall due. However, the party of the first part in such an event would perform the whole service provided for by the contract, in connection with the funeral and the burial of the deceased, long before the major portion of the funeral expense falls due. We are of the opinion that it is obvious from this arrangement that the contract does not constitute an insurance policy on its face.

We desire to suggest, however, that even though the contract does not, on its face, constitute an insurance policy, it would be very easy for the party of the first part, in the event that it had a substantial number of such contracts, to so conduct a business arising therefrom as to make it a fact that the association, under such circumstances, would actually be operating an insurance business. We are therefore of the opinion that even if a contract following the forms submitted is legal on its face, it has in it great potentialities for the operation of an illegal insurance business by reason of non-compliance by the party of the first part with some of the provisions therein.

CONCLUSION

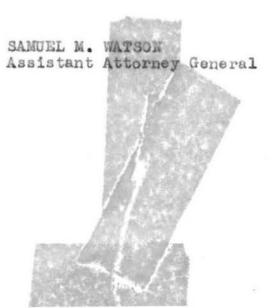
We are accordingly of the opinion that this contract, while legal on its face, nevertheless could be used as a means for violation of the law.

Respectfully submitted,

APPROVED:

J. E. TAYLOR Attorney General

SMW: VLM



COMPENSATION TO BE PAID : PROSECUTING ATTORNEYS : UNDER HOUSE BILL No. 297::

In determining compensation to be paid Prosecuting Attorneys under House Bill No. 297, the proper procedure is to add 25% of the sum provided under Section 12939 plus 25% of the sum provided under Section 9701.

July 18, 1949

Mr. William Lee Dodd Prosecuting Attorney Ripley County Doniphan, Missouri FILED 24

Dear Sir:

This department is in receipt of your recent request for an official opinion. Your request is embodied in the following language:

"I would like an interpretation of House Bill No. 297. This Bill raises the compensation of the Prosecuting Attorney 25%. My salary is \$1300.00 per year plus \$325.00 per year for juvenile cases, making a total of \$1625.00. Is this raise 25% of the \$1625.00?"

Section 12939 Mo. R.S.A. 1939, fixes the salaries of prosecuting attorneys in all Missouri counties having a population of less than 200,000, which brings Ripley County within the provisions of this section inasmuch as it has a population of between 12,500 and 15,000, which, according to section 12939, fixes the salary of the prosecuting attorney of Ripley County at \$1300.00 per annum. This section specifically designates such payment as "salary", and it is so construed in numerous cases decided under this section.

Section 9701 Mo. R.S.A. 1939, states:

"When any reputable person, being a resident of the county, shall file a complaint with the prosecuting attorney, stating that any child in the county appears to be a neglected or delinquent child the prosecuting attorney shall thereupon file with the clerk of the juvenile court a petition in writing setting forth the facts and verified by his affidavit. It shall be sufficient that the affidavit be on his information and belief. It shall be the duty of the prosecuting attorney immediately thereafter to fully investigate all

the facts concerning such neglected or delinquent child including its school attendance, home condition, and general environment, and to report the same in writing to the juvenile court, and upon hearing of such complaint to appear before the juvenile court and present evidence in connection therewith. prosecuting attorney shall receive as compensation for the additional services and duties required under this law, in addition to the salary and fees now allowed prosecuting attorneys by law, an amount equal to 25% of the annual salary of such prosecuting attorney per annum, to be paid in equal monthly installments upon the warrant of the county court issued in favor of the prosecuting attorney on the county treasurer for that purpose: Provided, however, that this section shall be applicable only to counties of less than 50,000 population."

This sum is referred to in the section as "compensation", and, being 25% of \$1300.00, amounts to \$325.00, in your case.

House Bill No. 297 reads:

"The prosecuting attorney in counties of the third and fourth class is hereby required to attend inquests by coroners in cases of death occuring by violence, and which may result in a charge of felony, and said prosecuting or circuit attorney shall make an investigation concerning said death and cause to be brought before the coroner any witnesses he may desire and shall be permitted by the coroner to assist in the interrogation of witnesses for the full development of the circumstances leading up to and resulting in said death, and for his information concerning any possible criminal charge that may grow out of the same. Prosecuting attorneys shall receive as compensation for the additional services and duties required under this law, in addition to the salaries and fees now allowed such prosecuting attorneys by law, an amount equal to twentyfive percent of the annual salary and fees of

This payment is also referred to as "compensation". As stated above, the regular salary of the prosecuting attorney of Ripley County is fixed by section 12939 at \$1300.00 per annum, and is "salary". Section 9701 allows the prosecuting attorney 25% of this regular salary in addition, which makes a total in your case of \$1625.00. This extra 25% is referred to as "compensation". House Bill No. 297 allows prosecuting attorneys "in addition to the salaries and fees now allowed such prosecuting attorney by law, an amount equal to 25% of the annual salary and fees of such prosecuting attorney per annum "

The question before us is whether the 25% provided for by House Bill No. 297 should be calculated upon the basis of the salary of \$1300.00 fixed by Section 12939, or by that sum plus the additional sum, in your case \$325.00, set by section 9701. If it is calculated upon the salary set by section 12939, then your total compensation would be \$1950.00 per annum. If it be calculated upon the sum provided to be paid under section 12939 plus the sum to be paid under section No. 9701, the total sum to be paid you would be \$1300.00, plus \$325.00, which is \$1625.00, and 25% of \$1625.00, which is \$406.25, making a total sum of \$2031.25 per annum.

To determine this issue we must, therefore, construe that portion of House Bill No. 297, which reads:

"Prosecuting attorneys shall receive as compensation for the additional services and duties required under this law, in addition to the salaries and fees now allowed such prosecuting attorneys by law, an amount equal to twenty-five percent of the annual salary and fees of such prosecuting attorney, per annum."

It will be observed that House Bill No. 297, in the first instance, uses the phrase "salaries and fees".

The use of the word "fees" is improper, for prosecuting attorneys do not receive fees. Section 12939 provides a "salary" and Section 9701 provides "compensation". By using the word "salaries" as House Bill No. 297 does in the first instance, and since "compensation" as used in Section 9701, may take the form of salary, we could with justification hold that when House Bill No. 297 uses the word "salaries" as being the base figure upon which the 25%, provided for in House Bill No. 297, is to be calculated, that it means the \$1300.00 provided for in Section 12939 plus the \$325.00 provided for in Section 9701, that is, in your case 25% of \$1625.00. Farther on, however, House Bill No. 297, in referring to precisely the same payments as it referred to in using the phrase "salaries and fees", uses the term "salary and fees", as being the base figure upon which the 25% provided for in House Bill No. 297 is to be calculated.

This gives rise to an ambiguity. In this instance a more meticulous attention to the niceties of grammatical construction would have been helpful, but we consider it to be our duty not to let the intent of the Bill be defeated by a technicality, or technicalities, and it seems to us that the intent of the Bill was that the 25% provided by House Bill No. 297 was to be calculated upon the "salary" provided by Section 12939 plus the "compensation" provided by Section 9701. We believe that when the Bill, in the second instance, used the term "salary and fees", it meant by "salary" the amount provided for in Section 12939, and by "fees" the amount provided for by House Bill No. 297 would be 25% of \$1625.00, and not 25% of \$1300.00, or a total of \$2031.25 per annum under Sections 12939, 9701 and House Bill No. 297.

CONCLUSION

It is the conclusion of this department that the meaning of House Bill No. 297, insofar as it relates to additional compensation to be paid to prosecuting attorneys in counties of less than 200,000 population, is that prosecuting attorneys should be paid under it 25% of the sum allowed to them under Section 12939 plus 25% of the additional sum allowed to them under Section 9701.

Respectfully submitted,

APPROVED:

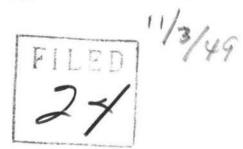
HUGH P. WILLIAMSON Assistant Attorney General

J. E. TAYLOR Attorney General SCHOOLS: LIBRARY

State Librarian and employees of Missouri Library Commission not within provisions of H.B. 151, Laws 1945, COMMISSION: as amended, setting up Public School Retirement System for teachers.

October 31, 1949

Mr. G. L. Donahoe Executive Secretary Public School Retirement System State Capitol Building Jefferson City, Missouri



Dear Sir:

We hereby acknowledge receipt of your recent request for an opinion, which reads as follows:

> "The Public School Retirement Act provides that on and after the effective date of the Act all 'employees' of districts included in the Retirement System shall be members of the System by virtue of their employment. The term 'employee' is synonymous with the term 'teacher' as used in the Act.

"'Teacher' is defined in Section 1 (6). This definition reads in part, as follows: 1 and the state superintendent of public schools or commissioner of education, persons employed in the State Department of Education or by the State Board of Education in an executive capacity and other persons employed by said State Board of Education on a full-time basis who shall be duly certificated under the law governing the certification of teachers !

"The statute creating the Missouri Library Commission, Section 14731, Laws of Missouri, 1945, reads as follows: 'The Missouri State Library shall be included in the Division of Higher Education in the State Department of Education, and shall be under the control of a State Librarian. The State Librarian of such division shall be appointed by the State Board of Education with the approval of the State Library Advisory Board. Such State Librarian shall be a graduate of an accredited college or university, and be graduated from an accredited library school, and must have library experience. The State Librarian shall appoint the personnel in connection with the various activities of such division subject to the approval of the Commissioner of Education, and the State Library Advisory Board.

"Is the State Librarian a member of the Retirement System by virtue of his employment if he is duly certificated under the law governing the certification of teachers?

"Are the personnel in the employ of the State Library who are duly certificated under the law governing the certification of teachers members of the Retirement System by virtue of their employment?"

In disposing of the inquiries contained in the foregoing request for an opinion, it becomes necessary to examine House Bill No. 151, Laws of Missouri, 1945, page 1353, the legislative enactment which provided for the public school retirement system generally applicable throughout the State of Missouri. Nowhere in House Bill No. 151, supra, is there to be found any direct reference being made to the State Librarian as being an official within the scope of the retirement law. If he is to be brought within the law, his status as State Librarian must bear positive affinity to the term "employee" as it is used and defined in the retirement law.

House Bill No. 151, supra, has undergone several changes since its enactment, but in ruling the question at hand, we need only to refer to Section 1 of the original act as amended by House Bill No. 1010, Laws of Missouri, 1945, page 1383. Subsection (3) of Section 1, House Bill No. 151, supra, as amended, provides:

"(3) 'Employee' shall be synonymous with the term teacher as the same is hereinafter defined."

Subsection (6) of Section 1, House Bill No. 151, supra, as amended, provides:

"(6) 'Teacher' shall mean any teacher, teacher-secretary, substitute teacher, supervisor, principal, supervising principal, superintendent or assistant superintendent, school nurse, or librarian who shall teach or be employed by any public school on a full-time basis and who shall be duly certificated under the law governing the certification of teachers; any county superintendents of schools, assistant county superintendent of schools and those employed by county superintendents of schools upon a full-time basis and who shall be duly certificated under the law governing the certification of teachers; and the state superintendent of public schools or commissioner of education, persons employed in the State Department of Education or by the State Board of Education in an executive capacity and other persons employed by said State Board of Education on a full-time basis who shall be duly certificated under the law governing the certification of teachers, provided that this clause shall not be construed to include employes (employees) of the University of Missouri, the Teachers Colleges of the State, or Lincoln University."

At this juncture it is necessary to examine the law creating the Missouri Library Commission as it now exists, such law being found in Senate Bill No. 369, Laws of Missouri, 1945, page 1132. This present law results from the repeal of Article 2 of Chapter 110 of the Revised Statutes of Missouri, 1939, and the enactment of a new article to be known as Article 2, Chapter 110 of the Revised Statutes of Missouri, consisting of Sections 14731 to 14736a, inclusive. Section 14731 of this law provides that the Missouri State Library shall be included in the Division of Higher Education in the State Department of Education, and shall be under the control of a State Librarian appointed by the State Board of Education with the approval of the State Library Advisory Board. Section 14733 of this law provides for the State Library Advisory Board, two members thereof to be chosen by the Governor with the advice and consent of the Senate, who with the President of the State Board of Education, the Commissioner of Education and the Librarian of the State University shall compose the Board. This particular section provides that the Board shall serve in an advisory capacity to the State Librarian, who shall serve as Secretary to the Board. Section 14734 of this law sets forth in specific language certain powers and duties of the State Library Advisory Board as follows:

> "The powers and duties of the State Library Advisory Board shall be as follows: make rules and regulations not inconsistent with

the law for its government and for the government of the State Library; give approval to the State Board of Education and Commissioner of Education on the appointment of the State Librarian; authorize the State Librarian to appoint such other assistants as may be necessary; and authorize the State Librarian to collect and present statistics and other information pertaining to libraries which shall be made available to other libraries in the state."

Section 14736a of this law vests authority in the State Librarian, with the assistance of the State Library Advisory Board, to administer all funds appropriated by the General Assembly for State Aid to Public Libraries, and the State Librarian with the State Library Advisory Board is authorized to make by-laws, rules and regulations touching the administration and allocation of such moneys.

Now, having briefly outlined the legislation setting up the Missouri Library Commission, it is necessary to determine whether such law, in its full, complete and effective operation, would cause the State Librarian, or any of the personnel necessary to the proper functioning of the Missouri Library Commission, to come within that portion of the definition ascribed to the word "teacher" found in Subsection (6) of Section 1, House Bill No. 151, supra, as amended, and reading as follows:

"(6) 'Teacher' shall mean * * * persons employed in the State Department of Education or by the State Board of Education in an executive capacity and other persons employed by said State Board of Education on a full-time basis who shall be duly certificated under the law governing the certification of teachers * * * ."

Is the State Librarian employed in the State Department of Education, or is he employed by the State Board of Education in an executive capacity? "When associated with the idea of service, the word employ means to hire or make use of the services of (Webster's New International Dictionary); and implies control by the employer over the means and manner of doing the work." Stein vs. Oil & Grease Company, 327 Mo. 804, 39 S.W. (2d) 345. The administrative autonomy of the Missouri Library Commission is very apparent from a reading of the law setting it up as an administrative body. If the lawmakers had intended

that the State Librarian and his assistants should be considered as "employees" of the State Department of Education or the State Board of Iducation, they would have so drafted the Missouri Library Commission law, but they have expressed no such intention. An intention quite to the contrary is evident when we consider the nature of powers and duties vested in the State Library Advisory Board, as well as the makeup of its personnel. The President of the State Board of Education and the State Commissioner of Education, by virtue of their office, become eligible and are appointed to membership on the State Library Advisory Board. They assist the State Librarian in administering the law creating the Missouri Library Commission. It is true that the State Librarian is appointed by the State Board of Education, but such appointment does not become effective until approval is given by the State Library Advisory Board, and this power of appointment by recommendation on the part of the State Board of Education contains no suggestion that the appointee, if approved, will then become the employee of the State Board of Education or State Department of Education, and not the employee of the State Library Advisory Board and consequently subject to its general orders and directions within the limits of powers conferred on the State Library Advisory Board.

Section 14731 of Senate Bill No. 369, supra, being the first section of the law creating the Missouri Library Commission, provides in part as follows:

"The Missouri State Library shall be included in the Division of Higher Education in the State Department of Education, and shall be under the control of a State Librarian. * * * "

The above clause serves merely as an aid in disclosing the legislative desires on a matter which is the subject of Section 12 of Article IV, Constitution of Missouri, 1945, which reads in part as follows:

" * * * Unless discontinued all present or future boards, bureaus, commissions and other agencies of the state exercising administrative or executive authority shall be assigned by the governor to the department to which their respective powers and duties are germane."

Having concluded that the State Librarian and other personnel of the Missouri Library Commission are not persons employed by the State Department of Education or by the State Board of Education, it is unnecessary to discuss the status of such persons under the law governing certification of teachers.

CONCLUSION

It is the opinion of this department that the State Librarian and other personnel of the Missouri Library Commission are not persons employed by the State Department of Education or by the State Board of Education within the definition of the words "employee" and "teacher" as those terms are defined in the law (House Bill No. 151, Laws of Missouri, 1945, page 1353, as amended), setting up a public school retirement system for teachers in Missouri, and consequently are not entitled to the benefits of such law.

Respectfully submitted,

JULIAN L. O'MALLEY Assistant Attorney General

APPROVED:

J. E. TAYLOR Attorney General

JLO'M: VLM

HEDGE FENCES:

Sec. 8578, R.S. Mo. 1939, requiring anyone owning a hedge fence along or near the right of way to keep it trimmed to a height of five feet, is valid and enforceable.

October 16, 1949

19/24/49

Hon. Ralph H. Duggins Prosecuting Attorney Saline County Marshall, Missouri



Dear Mr. Duggins:

We have your request for an opinion by this department upon the enforceability of Section 8578, R. S. Mo. 1939, relating to the trimming of hedge fences. Your letter is as follows:

"The undersigned has been requested by our County Court to ask for an opinion on the following matter:

"Section 8578 entitled Regulation of Hedged fences provides for the failure to comply with the cutting of a hedge along or near the right-of-way of any public road, shall cause a forfeiture, etc.

"The County Court, to co-operate and comply with the King Road Law, has endeavored to supervise and maintain county roads for the purpose of placing rock on said roads. Persons owning fences along said right-ofway have failed and refused and still fail and refuse to cut the hedge, brush or growth which has interfered with the maintenance of these roads.

"The question was asked 'Can the County Court, at the relation of the Prosecuting Attorney, file a civil action against the property owner for such failure to cut the hedge, is ish or growth and obtain a conviction and forfeiture.' In some instances, it is not entirely a hedge fence but barbed wire, brush and comer growth have prevented the roads from being maintained.

"An opinion is requested as to whether or not it would be possible for this section of the statute to be enforced and what requirements are necessary before said section is enforceable."

We understand the substance of your inquiry to be whether or not the section in question is enforceable, that is, whether it would be possible for the county court to prevail in a civil action, filed by the county at the relation of the prosecuting attorney, against a violator of this section. Section 8578, R. S. Mo. 1939, is as follows:

"Every person owning a hedge fence situated along or near the right of way of any public road shall between the first days of May and August of each year cut the same down to a height of not more than five feet, and any owner of such fence failing to comply with this section shall forfeit and pay to the capital school fund of the county wherein such fence is situated not less than fifty nor more than five hundred dollars, to be recovered in a civil action in the name of the county upon the relation of the prosecuting attorney, and any judgment of forfeiture obtained shall be a lien upon the real estate of the owner of such fence upon which same is situated, and a special execution shall issue against said real estate and no exemption shall be allowed. Any prosecuting attorney who shall fail or refuse to institute suit as herein provided within thirty days after being notified by any road overseer, county or state highway engineer, that any hedge fence has not been cut down to the height herein required within the time required, shall be removed from office by the governor to fill the vacancy thus created. The cutting of any such fence after the time herein required shall not be a defense to the action herein provided for."

In determining the validity of the above section two principal questions must be answered. First, whether the regulation and penalties involved are violative of the Constitution of Missouri, Article I, Section 10 (Due Process), as constituting an unreasonable exercise of the police power.

In the case of Lashly v. State, 236 Ala. 28, the Supreme Court, in response to a certified question, summed up the relation of the police power and due process as follows:

"Due process does not interfere with the police power of the state to make reasonable traffic and safety regulations."

In 11 Am. Jur. 1066, this general statement appears:

"It is an established rule that laws are not rendered unconstitutional by reason of their imposing burdens on persons or property, since the right to impose such burdens is an essential quality or incident of the police power."

Kansas City v. Holmes, 274 Mo. 159, shows the specific application of the above general statements, an application that bears a substantial similarity to the question at hand. In that case a city ordinance requiring owners and occupants of real property to remove snow from adjoining sidewalks, with a fine for violation thereof, was held not to conflict with the Missouri Constitution, Article I, Section 10, providing that no person shall be deprived of life, liberty or property without due process of law.

Similarly, a city ordinance prohibiting certain types of signs over sidewalks was held valid in Mallory, Inc. v. City of New Rochelle, 295 N. Y. 712, even though the owner in question had previously erected an expensive sign under authority of a permit.

In Santa Barbara County v. Moore, 176 Cal. 6, the court held that statutes regulatory of when and under what circumstances trees, on a highway, subserving useful, as well as ornamental purposes, may be destroyed, do not take the property of abutting owners without due process of law.

Conceding that the statute in question is not an unusual, and in fact a rather mild, exercise of the police power, the second and more difficult question of interpretation of the words, "hedge fence situated along or near the right of way" must be answered, and at some length, before the validity of the statute as a whole can be definitively tied.

Before examining the instances in which expressions similar to the above have been used in the statutes which subsequently were judicially construed, a few observations about statutory

construction in general where the issue was, as it is here, the necessity for definiteness. In State ex rel. Crow v. West Side St. R. Co., 146 Mo. 155, the court said:

"A statute cannot be held void for uncertainty if any reasonable or practical construction can be given to its language.

The fact that it is susceptible to different interpretations will not render it nugatory."

In Bergeson v. Mullinix, 399 Ill. 470:

"The failure of a statute to specify every detail, step by step, and action by action, will not render the statute vague, indefinite, or uncertain from a constitutional viewpoint."

Similarly, in Adams v. Greene, 206 S.W. 759:

"A statute will not be held void for uncertainty if any sort of practical or sensible construction may be given to it."

Similar statements appear in State v. LeBlond, 108 Ohio St. 41:

"Legislation otherwise valid will not be judicially declared null and void on the ground that the same is unintelligible and meaningless unless it is so uncertain and indefinite as not to indicate the matter or thing to which it relates or the purpose to be served."

The section in question has never been construed, and a search fails to reveal any statute using exactly the same words. However, there is a Texas case which considers the exact point here in question and discusses it in a logical and reasonable manner, at the same time convincingly upholding the constitutionality of the statute. I refer to Moore v. State, 133 Tex. Crim. Apr. 330. Here follows a quotation of a large part of the opinion, word for word, because of its very substantial application to the question before us:

"Appellant next complains relative to the indefiniteness and vagueness of the statute under which he was prosecuted, because the same prohibits the possession of whiskey

at or near the premises wherein wine and beer are legally sold, and contends that the phrase 'or near' renders the statute so uncertain as to offend against Article 6 of the Penal Code of 1925, which reads as follows: 'Whenever it appears that a provision of the penal law is so indefinitely framed or of such doubtful construction that it cannot be understood, such law shall be regarded as wholly inoperative.'

"The word 'near' is defined by Webster as 'within a little distance from; close or upon.' In our opinion the word 'near,' if too indefinite, could be eliminated, and we would still have left the possession of whiskey 'at' the premises. We do not think the addition of the words 'or near' would render the article herein proceeded under as in contravention of the Constitution."

Thus, with the exception of the word "along," we have before us a judicial construction of the phrase "along or near." The cases which are set out below conclusively show that the word "along" means in general the same as the word "at" or the word "near." For example, People v. Astle, 337 Ill. 253:

"The word 'along' is defined as being upon or at or near the side of."

Benton v. Horsley, 71 Ga. 619, held that the word "along" as used in the sentence, "along a line," etc., is equivalent to "up to" or "reaching to."

Nicolai v. Wisconsin Power & Light Co., 277 N.W. (Wisc.) 674, 678:

"The word 'along' in 'along the road' is used as a preposition meaning by the length of, lengthwise of, or at or near the side of, according to the context."

Hipp v. State, 97 S.W. (Texas) 90:

"'At' a private residence means 'nearby' or 'in proximity to.'"

Thus, by following the reasoning outlined above, it clearly appears that "at" or "along" is by itself sufficiently certain

to sustain the constitutionality of Section 8578, and the addition of the words "or near" should be treated either as mere surplusage and thus of no consequent detrimental effect, or as having the same meaning as either "at" or "along" and neither adding to nor subtracting from the meaning and, therefore, the validity of the statute.

Some other cases, not as closely in point but serving to further point out the unlikelihood of a statute, such as Section 8578, being declared unconstitutional because of the use of the expression "or near," are:

Fall River Iron Works Co. v. Old Colony & Fall River R. R. Co., 87 Mass. 221, 226, wherein the phrase "at or near" used in a statute was construed by the court as follows:

"In seeking for a correct and just exposition of this clause of the statute, the first and most obvious suggestion is that the legislature did not intend to fix with absolute certainty and precision the point of departure for the new road defendants were trying to build. In using language which was so vague and indefinite as to leave open for future determination the location of this point, it is clear that owing to the nature of the ground or for some other sufficient reason it was not deemed expedient or necessary to fix it with accuracy."

Manis v. State, 50 Tenn. 315, the statute provides:

" * * * nor shall any person give or sell (on election day) intoxicating liquor to any person, for any purpose, at or near an election ground."

The court construed the above statute as follows:

"The purpose of these enactments is to preserve good order and conserve peace. To make these objects more certain of attainment, the words 'at or near' an election ground are used. If the giving or selling is not at the election ground, but at a place not distant or remote, but of reasonably easy or convenient access, the party so giving or selling is guilty."

Williams et al. v. Board of Commissioners, 84 P. 1109 (Colo.), the court said:

"A notice posted more than one mile from the nearest point of the line of the proposed road is certainly not a compliance with the statutory requirements that the notices should be posted along the proposed new road. We think the adverb, 'along' as used in this connection means 'by the side of,' or near."

CONCLUSION.

This office is, therefore, of the opinion that Section 8578, R. S. Mo. 1939, insofar as it requires that the owner of a hedge fence must trim the same and providing for the enforcement of this provision, is a valid exercise of the police power of the state and may be enforced as provided in the statute.

Respectfully submitted,

H. JACKSON DANIEL Assistant Attorney General

HJD:ml

APPROVED:

J. E. TAYLOR Attorney General Assessors may be removed by order of the county court for failure to perform duties enjoined upon them by law; assessors may be proceeded against for failure to perform duties enjoined upon them by law upon their official bond, by the presiding judge of the county court, by the prosecuting attorney, or by any individual acting in his private capacity. Assessors failing to perform the duties of their office may be February 7, 1949 proceeded against in quo warranto

2-10

Honorable Clarence Evans Chairman, State Tax Commission Jefferson City, Missouri

Dear Mr. Evans:

We are in receipt of your letter requesting an opinion from this office upon the following issues presented in the form of two questions, the first one of which is:

"1. Should corn that has been harvested and is in the crib, bin, or is piled upon the ground, be assessable as tangible personal property?"

Cooley on Taxation, Volume 2, paragraph 561, states:

"Growing crops are taxable as real property before severance. After severance they are taxable as personalty."

The case of Bechler v. Bittick, 121 S.W.(2d) 188, 1.c. 191, states:

"It thus appears to be the law that where one in possession of land, even as a mere trespasser, plants, cultivates, and brings to maturity a crop, and severs it from the soil, he thereby becomes the owner of the crop; * * * * (Emphasis ours.)

The Bechler decision is sustained and quoted with approval in Dent v. Dent, 350 Mo. 560.

A long line of Missouri cases uniformly hold that crops which have been severed from the land upon which they grew are personal property. There are no Missouri decisions contrary to these holdings. Since crops which have been severed from the land are personal property, they should, of course, be assessed as such.

In view of the above, the answer to your first question is "Yes".

Your second question, restated by us in the second line of our answer to your first inquiry is:

"If the answer (to the first question) is "Yes" (which it is) what is the penalty if the assessor knowingly refuses to assess the same?"

Section 7, page 1784, Laws of Missouri, 1945, under the title of TAXATION AND REVENUE, states:

"Every assessor who shall knowingly fail to perform any duty enjoined upon him by law, in the time prescribed, shall be removed from office by the county court, who shall appoint another in his stead. Such new assessor shall take a like oath and give a like bond as required of the first, and the county court shall enter up judgment summarily upon the bond of such delinquent assessor, against him and his sureties, for such amount as shall be sufficient to complete the assessment of the county."

The above section would appear to constitute a clear grant of power to county courts to remove assessors who knowingly fail to perform any duty enjoined upon them by law, of which the assessment of all personal property within their county is certainly one.

We would call your further attention to Section 11234, R. S. Mo. 1939, which states:

"Every county clerk, assessor, collector or other officer, who shall in any case refuse or knowingly neglect to perform any duty enjoined on him by this chapter, or who shall consent or connive at any evasion of its provisions, whereby any proceedings required by this chapter shall be prevented or hindered, or whereby any property required to be listed for taxation shall be unlawfully exempted, or the same be entered upon the tax list at less than its full cash value, shall for every such offense, neglect or refusal be liable, individually and on his official bond, for

double the amount of the loss or damage caused thereby, to be recovered in an action of debt, in any court having jurisdiction, or by indictment, and may be removed from his office at the discretion of the court."

It is our opinion that this above quoted section confers the power upon the prosecuting attorney of any county, upon the judge of any county court of any county, or upon any citizen of any county acting in his individual capacity, to institute a civil action against any county assessor who is delinquent in the performance of the duties of his office.

We would call your further attention to the case of State ex inf. McKittrick v. Wymore, 119 S.W.(2d) 941, which case holds that if a county officer neglects to perform the duties enjoined upon him by law in the conduct of his office he may be proceeded against in a quo warranto proceeding.

CONCLUSION

It is the conclusion of this office that corn that has been harvested and is in the crib, bin, or is piled upon the ground, is assessable as tangible personal property.

It is the further conclusion of this office that if a county assessor fails to perform the duties enjoined upon him by law that he may be removed from office by the county court; that he may be sued upon his official bond by the presiding judge of the county court, by the prosecuting attorney, or by any individual acting in his private capacity; or that quo warranto proceedings may be brought against such a negligent assessor to remove him from office.

Respectfully submitted,

HUGH P. WILLIAMSON Assistant Attorney General

APPROVED:

J. E. TAYLOR Attorney General

HPW:mw

ASSESSORS: TAXATION: Assessor need not call upon taxpayer to take his list and view property. Duty of taxpayer to deliver completed list to assessor.

March 2, 1949

3.9

Honorable Clarence Evans Chairman, State Tax Commission Jefferson City, Missouri

Dear Sir:

We have received your letter of recent date requesting an official opinion of this department, which letter reads as follows:

"It has been called to our attention that a number of assessors throughout the state have been putting ads in their local newspapers advising taxpayers that they will be in their office on certain dates to receive their assessment lists. It has been our opinion that it was the duty of the assessor to call on the taxpayer, take his list, and at the same time view the property being assessed.

"Under H.C.S.H.B. 469, Section 14, it states that where a list has not been given to the assessor, the assessor shall himself make out the list on his own view or on the best information he can obtain. This verifies our opinion on the above, but only where no list has been given.

"Under Section 10 of the same House Bill, it provides:

'He shall call at the office, place of doing business, or residence of every person required by this chapter to list property, and shall require such persons to make a correct statement of all taxable real and tangible personal property in the county owned by such person, etc.

"You will note that it does not state that he must view the property.

"Also under S.C.S.H.B. 943, (covering counties of

the first class) Section 5, it says in part # #

'Said returns shall be delivered to the office of the assessor of said county between the first day of January and the first day of March of each year, etc. * * *

"At the end of the same section it states:

'For the convenience of taxpayers the assessor shall mail to or leave at the residence or place of business of such taxpayers a list for making such return.'

"It is true this last Bill covers counties of the first class, but nevertheless, it does not require the assessor to view the property."

In counties other than those in the first class, the method and procedure required in the assessment of real and tangible personal property is provided for in H.C.S.H.B. 469, Laws Missouri 1945, page 1782. Section 10 of this Act reads, in part, as follows:

"The State Tax Commission shall design the necessary assessment blanks and they, together with the assessment books, shall be furnished by the county clerk at the expense of the county, and shall be turned over to the assessor at least sixty days prior to January 1st of each year. After receiving the necessary forms the assessor or his deputy or deputies shall, except in the City of St. Louis, between the first day of January and the first day of June, 1946, and each year thereafter, proceed to make a list of all real and tangible personal property in his county, town or district, and assess the same at its true value in money in the manner following, to wit: He shall call at the office, place of doing business or residence of each person required by this chapter to list property, and shall require such persons to make a correct statement of all taxable real and tangible personal property in the county owned by such person, or under the care, charge or management of such person, except merchandise which may be required to pay a license tax and except all other property which may be exempted by law from taxation. The person listing the

property shall enter a true or correct statement of such property, in a printed blank prepared for that purpose; which statement after being filled out, shall be signed and either affirmed or sworn to as provided in this chapter. The list shall then be delivered to the assessor. Such lists shall contain: * * *

This section provides for the procedure to be employed by the assessor or his deputies in ordinary situations; that is, all cases other than those in which the persons required to list property, when called upon, are absent, sick or have died, or where no list has been returned to the assessor.

Section 10, supra, requires that the assessor, his deputy or deputies "shall call at the office, place of doing business or residence of each person required by this chapter to list property, and shall require such persons to make a correct statement of all taxable real and tangible personal property in the county owned by such person * * *." The first question presented is when has the assessor, his deputy or deputies, required a person to make such correct statement.

It was held in the case of United States v. Armour & Co. 142 Fed. 808, 1.c. 822, that "require means to ask of right and by authority. Anything is a requirement by a public official which brings home to the person called upon that the official is there officially and desires compliance." Therefore, after an assessor or deputy assessor has called upon a person required to list property and officially demanded he make a correct statement and comply with the statutory provisions, the assessor or deputy assessor has discharged the duties set out for him in Section 10.

Section 10 of this act also states those duties with which the taxpayer must comply when officially informed and required by the assessor or deputy assessor to make a correct statement. It is provided that "the person listing the property shall enter a true or correct statement of such property in a printed blank prepared for that purpose; which statement after being filled out shall be signed and either affirmed or sworn to as provided in this chapter. The list shall then be delivered to the assessor. Such list shall contain: * * *." It is not required that the list be made out in the presence of the assessor or deputy assessor. The oath need not be administered by the assessor or deputy assessor, who may administer it, but it may also be administered by any of those public officials enumerated in Section 16 of the act. It is further provided and made the duty of the person preparing the list to deliver it to the assessor after it has been made, signed, and either sworn to or affirmed.

The only wording in this section which could possibly be construed as demanding the assessor or deputy assessor to call upon the taxpayer and take his list and at the same time view the property assessed is that wording which states that the assessor or deputy assessor "shall require such persons to make a correct statement of all taxable real and tangible personal property * * *." But the courts have declared the meaning of the word "require" to be to officially demand and insist upon compliance. In this case the compliance of which the assessor or deputy assessor must officially inform the taxpayer and insist upon, is making out the list, signing and affirming and swearing thereto, and returning it to the assessor.

If it had been the intent of the General Assembly to have all this done in the presence of the assessor or deputy assessor at the time he calls upon the taxpayer there would have been no need to provide that the necessary oath could be administered by certain public officers other than the assessor or deputy assessor. Nor would it have been necessary to provide that the person making out the list deliver the same to the assessor.

Section 11 of H.C.S.H.B. 469, supra, reads, in part, as follows:

"If any person required by this chapter to list property shall be sick or absent when the assessor calls for a list of his property, the assessor shall leave at the office, or the usual place of residence or business of such person, a printed assessment blank and a printed notice, requiring such person to make out and mail or take to the office of said assessor, not more than twenty days from the date of such notice, a sworn statement of the property which he is required to list. * * *"

Here it is plainly stated that the assessor or deputy assessor need not be present when the list is made nor view the property
assessed if the taxpayer is sick or absent when called upon. In
these cases the person making the list is even allowed to mail
same in place of delivering it to the assessor. There is no
requirement of any sort that he notify the assessor that he has
completed his list in order that the assessor may call upon him
to receive same and view the property assessed.

The only mention in the act as to a viewing of the property by the assessor is in Section 14 which provides that "the assessor shall himself make out the list, on his own view, or on the best information he can obtain," which applies only when no list has been given to the assessor in proper time and manner. Since the assessor is not bound to call upon the taxpayer, take his list and view the property assessed and since it is the duty of the taxpayer to deliver the completed list to the assessor, there can be no complaint if the local assessor sees fit to advertise in the local newspaper that he shall be in his office on certain dates to receive assessment lists.

CONCLUSION

It is the opinion of this department that the assessor, after having called at the office, place of doing business or residence of the taxpayer and having officially required that an assessment list be made, need not again call upon the taxpayer to take his list and view the property assessed. It is the duty of the taxpayer to deliver the completed list to the assessor and there should be no complaint if the assessor advertises that he shall be in his office on certain dates to receive these assessment lists.

Respectfully submitted,

RICHARD H. VOSS Assistant Attorney General

APPROVED:

J. E. TAYLOR Attorney General

RHV:mw

ASSESSOR: All tangible personal property owned by taxpayer to be

TAXATION: assessed in his county of residence.

March 7, 1949

FILED 27

Honorable Clarence Evans Chairman, State Tax Commission of Missouri Jefferson City, Missouri

Dear Sir:

Your recent letter requesting an opinion of this department reads as follows:

"We have had some inquiries from assessors regarding property in their counties that has gone unassessed because of their interpretation of the assessment laws. We will appreciate a little clarification of the following laws:

"H.C.S.H.B. 471, Laws of 1945, Section 8, States:

'Personal property to be assessed in county of owner's residence-exceptions.
--All tangible personal of whatever nature and character situate in a county other than the one in which the owner resides shall be assessed in the county where the owner resides, except tangible personal property belonging to estates, which shall be assessed in the county in which the probate court has jurisdiction."

"In refutation of the above we submit Section 4 of H.C.S.H.B. 469, which states that the assessor shall take an oath to assess all of the real and tangible personal property in his county, and Section 10 of the same Bill which states that after receiving the necessary forms the assessor shall proceed to make a list of all real and tangible personal property in his county.

"Also under S.C.S.H.B 943, Section 5, covering counties of the first class, it states, 'It shall be the duty of every person * * * owning or controlling taxable tangible personal property situated in any such county, to file with the

assessor of <u>such</u> county, an itemized return giving all such tangible personal property, etc.'

"We believe the above matter was determined by the courts in volume 301 Mo., Page No. 72, however, this decision was rendered in 1923 and while the law reads the same now as it did then, we do not believe that the new laws governing assessors and assessments, read the same as at that time. It seems that prior to 1909 tangible personal property was assessed at the situs, but Sections 11137 and 11355, R. S. Mo. 1909 changed this requiring personal property to be taxed in the county in which the owner resides.

"We are of the opinion that a considerable amount of personal property is not being assessed for the reason that an owner residing in Jackson County will make his personal return on his property in Jackson County as required under House Bill 943, above mentioned, and although he may own personal property in several other counties, the assessor of these other counties, under the present law, will not assess this property in their counties because of Section 8 of House Bill 471."

Section 8 of H.C.S.H.B. 471, Laws Missouri 1945, page 1799, reads as follows:

"All tangible personal property of whatever nature and character situate in a county other than the one in which the owner resides shall be assessed in the county where the owner resides, except tangible personal property belonging to estates, which shall be assessed in the county in which the probate court has jurisdiction."

This section fixes the residence of the owner as the legal situs for the taxation of all his tangible personal property subject to taxation by the laws of Missouri. The situs is thus fixed for all the purposes of taxation; see State ex rel. White v. Timbrook's Estate, 129 S.W. 1068, 145 Mo. App. 368. It must therefore be concluded that an assessor of a county other than the owner's residence cannot assess the tangible personal property of the non-resident owner physically situated within that assessor's county because that property has no situs for taxation purposes within that county.

H.S.H.B. 469, Laws Missouri, 1945, p. 1782, relating to assessors and assessments of property, must be construed in the light of Section 8 of H.C.S.H.B. 471, supra. When the assessor executes his oath as required by Section 4 of H.S.H.B. 469, "to assess all of the real and tangible personal property in the county in which he assesses," he has sworn or affirmed that he shall assess all tangible personal property having a situs for taxation purposes within that county.

Similarly, when Section 10 of H.S.H.B. 469 makes it the duty of the assessor "to make a list of all real and tangible personal property in his county, town, or district, and assess the same" and to "require such persons to make a correct statement of all taxable real and tangible personal property in the county owned by such person," the tangible personal property to be listed and assessed is that property having its legal situs for taxation purposes in that county.

That this is the proper construction is shown further by the fact that Section 17 of this Act requires the person listing property to "swear that the foregoing list contains a true and correct statement of all the real property and tangible personal property, made taxable by the laws of the State of Missouri which I owned or * * *." Any person residing in a county and owning tangible personal property which has that county for its taxation situs must prepare such a list and deliver it to the assessor of that county, swearing or affirming that such list is a true statement of all tangible personal property made taxable by the State of Missouri.

S.C.S.H.B. 945, Laws Missouri 1945, p. 1930, relates to the taxation of real and tangible personal property in first class counties. Section 5 of this Act reads in part as follows:

"It shall be the duty of every person, corporation, partnership or association, subject to taxation under the laws of this State, owning or controlling taxable tangible personal property situated in any such county, except, * * *to file with the assessor of such county an itemized return listing all such tangible personal property so owned or controlled on January 1st of each year and estimating the true value thereof in money. * * *"

This Act too must be read in conjunction with Section 8 of H.C.S.H.B. 471, supra. The tangible personal property required to be listed is again that tangible personal property which has that county as its situs for taxation purposes.

CONCLUSION

It is therefore the opinion of this department that the county in which the owner resides is the legal situs of all tangible personal property by him owned and is to be assessed in that county, That tangible personal property situated in counties other than the residence of the owner cannot be assessed in those counties because, for taxation purposes, those counties are not the legal situs of such property.

Respectfully submitted,

RICHARD H. VOSS Assistant Attorney General

APPROVED:

J.E. TAYLOR Attorney General

RHV:mw

TAXATION: FRANCHISE TAX: Missouri corporation owning real estate in state in which it has not qualified to do business not entitled to allocate shares and surplus.

May 9, 1949

Honorable Clarence Evans Chairman, State Tax Commission Jefferson City, Missouri FILED 2.7

Dear Sir:

We have received your request for an opinion of this department on the following question:

"A Missouri corporation which is not licensed to do business in any other state, owns real estate in another state. Is this real estate assessable for franchise tax in Missouri?"

Section 135 of the General and Business Corporation Act of Missouri, Laws 1943, page 410, provides for the payment of corporation franchise taxes in this state. The tax is levied upon the value of the outstanding shares and surplus of corporations organized under the laws of Missouri. The section above referred to contains the following provision:

"If such corporation employs a part of its outstanding shares in business in another state or country, then such corporation shall pay an annual franchise tax equal to one-twentieth of one per cent of its outstanding shares and surplus employed in this state, and for the purposes of this Act such corporation shall be deemed to have employed in this state that proportion of its entire outstanding shares and surplus that its property and assets in this state bears to all its property and assets wherever located." (Underscoring ours.)

That the state of Missouri may, in the situation which you have presented, constitutionally impose a tax upon the entire

outstanding capital and surplus of such corporation is believed to be clear. The rule is stated in 98 A.L.R. 1444, as follows:

"It seems to be well settled that a franchise, excise, or license tax upon domestic corporations, measured by or based on the capital stock of the corporation, is not unconstitutional or beyond the power of a state, merely because such stock represents, in whole or in part, property located outside the state."

The question, therefore, is whether or not the above-quoted statutory provision permitting allocation is applicable in the situation which you have presented. The emphasized words prescribe that a Missouri corporation, in order to be permitted to make the allocation, must employ a part of its outstanding shares "in business in another state."

Generally speaking, when a corporation is engaged in business in a state other than that of its incorporation, it is required to qualify or obtain a license or permit in such other state. Of course, the State Tax Commission is not concerned with the enforcement of the laws of other states requiring qualification of Missouri corporations doing business therein, and the fact that a Missouri corporation was or was not qualified in such foreign state would ordinarily be irrelevant in determining the corporation's liability for Missouri franchise tax.

However, the holding of real estate by a Missouri corporation outside this state presents a somewhat different situation. The rule has been quite frequently announced "that the mere ownership of property in (a) state, unaccompanied by its active use in furtherance of the business for which the corporation was formed, is insufficient in itself, or together with acts incidental to such ownership, such as the payment of taxes or the bringing of suits to protect the property against trespasses, to constitute doing business in the state." (23 Am. Jur., Foreign Corporations, Sec. 372, p. 359.) That rule was applied by the Supreme Court in this state in the case of Parker v. Wear, 230 S.W. 75. In that case the court said, at 1.c. 80:

" * * * It is sufficient to say that the taking of a single conveyance of real

estate situated in Missouri and afterward conveying the real estate to another, standing alone, is not transacting business in the state within the prohibition of the statute. * * *"

In view of this rule, we feel that the State Tax Commission, in the absence of other facts, would be justified in determining that the corporation in question, since it has not qualified in the foreign state, is not in business in such state within the meaning of Section 135, supra, and therefore is not entitled to make use of the allocation formula.

Such determination would appear to be in accord with the apparent purpose of the Legislature in enacting a provision relating to allocation, the apparent purpose being not to subject Missouri corporations engaged in business in other states to multiple franchise taxes upon their capital and surplus. The corporation here, not having qualified to do business in the state in which the real estate is located, would not be subjected to franchise tax there. Consequently, there would be no question of multiple taxation.

CONCLUSION

Therefore, it is the opinion of this department that a Missouri corporation which owns real estate in another state but has not qualified to do business in such state is subject to payment of franchise tax upon its entire issued shares and surplus, and is not entitled to allocate that portion of its shares and surplus represented by such real estate in another state.

Respectfully submitted,

ROBERT R. WELBORN
Assistant Attorney General

APPROVED:

J. E. TAYLOR Attorney General INTERSTATE BRIDGE: TAXATION:

The State of Missouri may tax that portion of an interstate bridge owned by Richardson County, Nebraska, which lies within the state of Missouri.

September 5, 1949

9/10/49

Honorable Clarence Evans Chairman, State Tax Commission Jefferson City, Missouri



Dear Sir:

This department is in receipt of your recent request for an official opinion, which request is stated by you as follows:

"Richardson County, Nebraska, the owner of the Rulo Toll Bridge, has filed, under protest, a report of the Bridge for Ad valorem tax. Onehalf of said Bridge is in Holt County, Missouri.

"Their attorney, G. Lee Burns of Kansas City, Missouri has filed with the report a letter setting out in detail why they claim this Bridge is not taxable in Missouri.

"We attach the letter of Mr. Burns' and would be pleased to have your opinion as to whether, under the law, we should assess that part of the Bridge that is in Missouri."

The Missouri statute authorizing the taxing of interstate bridges is Section 11295, Mo. R.S.A. 1939. That section reads:

"All bridges over streams dividing this State from any other state owned, controlled, managed or leased by any person, corporation, railroad company or joint stock company, and all bridges across or over navigable streams within this state, where the charge is made for crossing the same, which are now constructed, which are in the course of construction, or which shall hereafter be constructed, and all property, real and personal, including the franchises owned by telegraph, telephone, electric power and light companies, electric transmission lines, oil pipe lines, gas pipe lines, gasoline pipe

lines, and express companies, shall be subject to taxation for state, county, municipal and other local purposes to the same extent as the property of private persons. And taxes levied thereon shall be levied and collected in the manner as is now or may hereafter be provided by law for the taxation of railroad property in this state, and county courts, and the county and state boards of equalization are hereby required to perform the same duties and are given the same powers in assessing, equalizing and adjusting the taxes on the property set forth in this section as the said courts and boards of equalization have or may hereafter be empowered with in assessing, equalizing, and adjusting the taxes on railroad property; and the president or other chief officer of any such bridge, telegraph telephone, electric power and light companies, electric transmission lines, oil pipe lines, gas pipe lines, gasoline pipe lines, or express company or the owner of any such toll bridge, is hereby required to render statements of the property of such bridge, telegraph, telephone, electric power and light companies, electric transmission lines, oil pipe lines, gas pipe lines, gasoline pipe lines, or express companies in like manner as the president, or other chief officer of the railroad company is now or may hereafter be required to render for the taxation of railroad property."

This section, 11295, supra, has been construed by several Missouri cases, none of which, however, presented the same fact situation which is present in the instant case. State ex rel. v. Railroads, 215 Mo. 479, was a case in which the interstate bridge, which was the subject of the litigation, was owned by a private corporation and was leased to a railroad. Substantially the same fact situation was present in the cases of State ex rel. Glenn v. Mississippi River Bridge Company, 134 Mo. 321, and State ex rel. v. Hannibal and St. Joseph Railroad Company, 89 Mo. 98. The above listed cases are the only Missouri cases construing Section 11295, supra. For guidance in this matter we must therefore look to decisions in other states which present fact situations similar to the one in this instant case.

It may be conceded that, while the bridge is unquestionably subject to taxation, taxes may not be levied and assessed unless there is a statutory authority providing for the assessment and collection of such taxes. We have a general statute providing for the assessment and collection of taxes on all property, real and personal, in the state which is applicable to all classes of property not covered by a special plan or scheme of assessment.

This statute, Section 10950, R. S. 1935, as amended Laws 1945, pages 1785, 1787, would authorize the assessment of this bridge as real property by the county assessor in the same way as other real estate is assessed.

Section 11295 is one of several statutes providing for the assessment of special classes of property. It describes the property as "All bridges over streams dividing this state from any other state owned, controlled, managed or leased by any person, corporation, railroad company or joint stock company, * * * This description may be intended to exclude bridges owned by a municipal corporation or subdivision of this state. It is unnecessary in answering your inquiry to determine this. Counsel for the owner of this bridge urges that, because the ownership is vested in a county of the State of Nebraska, the statute is inapplicable because counties are not named. The meaning of the word "person" in this section may properly be held to include a foreign county. Section 11211, R. S. 1939, defines "person" as, "person, firm, company, corporation or otherwise, whenever the case may so require its use or application." Since Section 11295 provides a general plan for the assessment of toll bridges, the word "person" is properly held to include all entities capable of holding title to the property.

Section 11295 must be construed in connection with the constitutional provisions and other statutes relative to taxation and assessment.

The Constitution of 1875, as well as the Constitution of 1945, provides that all property in the state shall be subject to taxation, except that certain exemptions are authorized. Among the exemptions authorized is that of property owned by counties. The statute providing for this exemption is Section 10937, R. S. 1939. The pertinent part of this statute is:

"The following subjects are exempt from taxation: First, all persons belonging to the army of the United States; second, lands and lots, public buildings and structures with their furniture and equipments, belonging to the United States; third, lands and other property belonging to this state; fourth, lands and other property belonging to any city, county or other municipal corporation in this

state, * * * " (Underscoring ours.)

It is plain that the bridge, being real property in the State of Missouri, is subject to taxation unless the exemption granted to counties is applicable. No Missouri case is found directly in point, but the question has been passed on in numerous cases in other jurisdictions. These cases uniformly hold that exemptions granted to "counties" are applicable only to counties of the particular state and not to foreign municipal corporations or political subdivisions.

We think the case of People ex rel. Murray v. City of St. Louis, 126 N.E. 529, is very pertinent here and supports the theory of this department because the same question which you have propounded was before the Supreme Court of Illinois, in relation to the taxing of the Municipal Bridge in St. Louis which terminates on the east bank of the river in Illinois. In discussing this question, the Court said: (L.c. 531)

"Section 3 of Article 9 of the Constitution of 1870 provides:

'The property of the state, counties and other municipal corporations, both real and personal, and such other property as may be used exclusively for agricultural and horticultural societies, for school, religious cemetery and charitable purposes, may be exempted from taxation; but such exemption shall be only by general law. In the assessment of real estate incumbered by public easement, any depreciation occasioned by such easement may be deducted in the valuation of such property.

"(4-7) Under this constitutional provision it cannot very well be argued that this bridge is exempt as a municipal corporation's property, as the municipality owning it is not a municipality of this state. Moreover, there is a provision in this state for taxing bridges across navigable streams forming the boundary line between Illinois and other states. Hurd's Stat. 1917, sec, 354, p. 2497. All property is subject to taxation unless exempted by the Constitution or statutes passed in accordance therewith.

And, at 1.c. 532, the Court further said:

"(8) It is also argued by counsel for appellant that as this bridge was constructed under the authority of an act of Congress it cannot be taxed by the state authorities. It is clear that by this act of Congress the federal government did not retain exclusive power of legislation on all matters pertaining to this bridge; therefore, under the reasoning of Moline Water Power Co. v. Cox, 252 III. 348, 96 N.E. 1044, the state authorities retained the power to tax the bridge. The federal government has authorized the construction of several railroad bridges over the Mississippi river near St. Louis, and one of them -the Eads bridge, as we understand it -is not only used by railroads, but it is used for street cars, vehicles, and pedestrians, and yet it has been taxed by the state authorities. People v. St. Louis Merchants' Bridge Co. (No. 12580) 291 Ill. 95, 125 N. E. 752."

In further support of this point we direct your attention to 81 A.L.R., page 1518, which states:

"II. Taxation of property belonging to political division of another state.

"Where a public service plant belonging to a manicipality is situated in another state, it is taxable therein, and a statute of the state where the plant is located exempting the property of municipalities is not applicable. "Thus, in Augusta v. Timmerman (1916; C.C.A. 4th) 147 C.C.A. 222, 233 Fed. 216 (affirming decree of (1915; D.C.) 227 Fed. 171), it appeared that a city in Georgia owned land in South Carolina, the use of which was essential to its water supply system. Holding that a South Carolina statute exempting municipal waterworks from taxation was not applicable to that land, the court said: 'Unless otherwise expressed, all legislation of a state relating to cities and towns refers to the cities and towns of that state, and not of another state or country. This is for the reason that the state has no control of cities and towns in other states, and from a governmental standpoint no interest in them. For a state to attempt to promote the development of cities and towns outside of its borders by exempting property owned by them from taxation exacted of its own citizens would be so anomalous and contrary to legislative history and governmental policy that nothing but the clearest affirmative expression would warrant such an inference. The general assembly of South Carolina legislating concerning taxation and exemptions of cities and towns, had no thought of cities and towns not subject to its legislation. The plain purpose was to exempt certain governmental agencies of its own municipal corporations.'

"The provisions of the Constitution of Illinois exempting municipal property from taxation has reference only to municipal corporations in Illinois. Hence, a portion of a bridge and approaches thereto in Illinois territory, the property of a Missouri city, may secure no exemption under such provision. People ex rel. Murray v. St. Louis (1920) 291 Ill. 600, 126 N. E. 529.

"Similarly, the exemption from taxation of the property of the state and any of its municipalities provided for in the Constitution and statutes of Kansas refers to the municipalities of Kansas, and not to those of another state. Thus, a waterworks plant owned by a Missouri city, but located in Kansas, is taxable in the latter state. State ex rel. Taggart v. Holcomb (1911) 85 Kan. 178, 50 L.R.A. (N.S.) 243, 116 Pac. 251, Ann. Cas. 1912D, 800 (writ of error dismissed in (1912) 226 U.S. 599, 57 L. ed. 375, 33 S. Ct. 112) The court in this case said: 'So it may be said here that when a city of the state of

Missouri comes into Kansas, it comes as a private party and brings with it none of the prerogatives of sovereignty. The general rule is that all property not expressly exempted is taxable, and the fact that the state does not tax itself and its municipalities to obtain revenue for itself is no reason why a foreign municipality, who is here in the capacity of a private proprietor and whose property receives protection from the state, should contribute nothing toward that protection or should escape paying the taxes imposed upon other owners of property. It is clear that the exemptions from taxation, provided for the state and for cities and municipalities of the state, are only declaratory of the immunity that would be granted on fundamental principles of government, and that the cities and municipalities referred to in the statute and Constitution are those of our own state. !"

We would call your further attention to 99 A.L.R., page 1144, which states:

"II. Taxation of property belonging to another state or political subdivision thereof.

"a. In general

"(Supplementing annotation in 81 A.L.R. 1518.)

"As a general rule, property of a municipality located in another state has been held taxable therein; and the courts are fairly in agreement that exemption in the state of the situs of municipal and/or other public property has no application to such property, on the theory that by entering another state the political unit has forfeited all claim to sovereignty.

"Where land situated in New Orleans was devised to the city of Baltimore and the city of New Orleans in trust to provide for the education of the poor of each city, the tract belonging to the city of Baltimore was held, in New Orleans v. Salem Brick & Lumber Co. (1914) 135 La. 828, 66 So. 237, liable to taxation in New Orleans, since the city of Baltimore had not entered the state of Louisiana with the attributes of sovereignty."

From the above it is the opinion of this department that Section 11295, supra, in that portion of the section which states that: "all bridges over streams dividing this state from any other state-owned, controlled, managed or leased by any person, corporation, railroad company or joint stock company, * * * where the charge is made for crossing the same, * * * shall be subject to taxation * * *, "includes all toll bridges not exempted by Section 10937, R. S. Mo. 1939, and that the portion of bridges owned in foreign states which lie in Missouri may be taxed in Missouri regardless of ownership.

We may add that this opinion which we are rendering in this instant case is in accord with an opinion rendered by this department on January 19, 1942, to Mark Morris, prosecuting attorney of Pike County, Missouri, which opinion held that the state of Illinois could tax that portion of a bridge owned by Pike County, Missouri, which lay in the state of Illinois.

CONCLUSION

It is the conclusion of this department that the state of Missouri may tax that portion of an interstate bridge owned by Richardson County, Nebraska, which lies within the state of Missouri.

Respectfully submitted,

APPROVED:

HUGH P. WILLIAMSON Assistant Attorney General

J. E. TAYLOR Attorney General

HPW:mw

LEVEE DISTRICTS)
TAXATION

No appeal lies to State Tax Commission on assessments on formation of county court levee districts.

November 28, 1949

Filed: #27

Honorable Clarence Evans Chairman, State Tax Commission Jefferson City, Missouri

Dear Sir:



We have received your request for an opinion of this Department, which request is as follows:

"The State Tax Commission received an appeal from one Clarence Hall of Holt County, Missouri covering the assessments for benefits on part of the lands owned by him in Holt County Levee District #7. The Commission heard the case on Tuesday, October 18 and would appreciate some legal advice from your office.

"There are several items involved in this appeal which are as follows:

- "1. In assessing lands for benefits in a Levee District should an assessor place the same valuation on all lands? We refer to Sec. 12561, page 3316, R. S. 1939.
- "2. Can a land owner in a Levee District appeal to the Board of Equalization year after year on an assessment for benefits? We refer to Sec. 12569, Page 3316, R. S. 1939.

"The case in question is as follows:

"For the year 1948, the appellant Clarence Hall attended the land owners meeting and voted for the benefit assessment of \$25 per acre on all the land in the Levee Districts.

The majority of the land owners voted the same way and consequently the assessment was passed. Later at the Board of Equalization, Clarence Hall appealed on two grounds. 1. That his ground between the Levee and the River should not be subject to benefit assessment and this was granted by the board. 2. That some of his ground in this district should not be assessed for benefits, being either too high or too low and consequently not deriving any benefit. The board rejected his appeal and he failed to appeal to the State Tax Commission in 1948 claiming that the County Clerk had promised to advise him of the decision of the Board of Equalization but failed to do so in time for him to appeal to the State Tax Commission. In 1949 he again appealed to the County Board of Equalization and was rejected on the grounds that they had no authority to make any changes after the first year. He then appealed to the State Tax Commission and the case was heard."

Although, as a matter of policy, we answer only questions asked of this department in a request for an opinion, nevertheless, we feel that in the present situation, the matter in question should be disposed of by your commission on a basis not suggested in your request.

Article VIII, Chapter 79, R. S. Missouri, 1939, deals with the organization and operation of county court levee districts. Section 12569 of that article provides for appeals to the county board of equalization from assessments upon the formation of such levee districts, as follows:

"Section 12569. The county board of equalization and the court of appeals shall have and receive the same jurisdiction over the lands taxed for the purposes in this article specified, as conferred by the general laws of the state in the assessment of property for state and county purposes, and complaints of all persons who think themselves aggrieved by the assessment of their lands shall be made at the same time required by the general revenue laws of the state. All corrections made in the assessment of lands

by the county board of equalization or the court of appeals, shall be certified to the board of directors by the clerk of the county court where such corrections are made."

No provision is found in Article 8 of Chapter 79 for an appeal to the State Tax Commission. The only provision which might be relied upon as a basis for such appeal is Section 11033.14 (5), Missouri R.S.A., Laws of 1945, page 1805, 1812, which provision reads:

"Every owner of real property or tangible personal property shall have the right of appeal from the local boards of equalization under rules prescribed by the State Tax Commission. Said Commission shall investigate all such appeals and shall correct any assessment which is shown to be unlawful, unfair, improper, arbitrary or capricious."

That section, when considered in its entirety, clearly has reference to procedures in the collection of taxes generally. Benefits assessed upon the construction of levees have been held not to be taxes within constitutional provisions. Morrison v. Morey, 146 Mo. 543, 48 S.W. 629.

Furthermore, laws governing the organization of levees and drainage districts are codes unto themselves. State ex rel. Scott v. Trimble, 308 Mo. 123, 272 S.W. 66. Statutes in other articles providing for determination of benefits to be assessed upon construction of levees and drainage ditches have been held to constitute a complete scheme for such determinations. See Sections 12338, 12509 and 12410, R. S. Missouri, 1939. Section 12338, found in Article 1 of Chapter 79, and relating to circuit court drainage districts, and Section 12509, found in Article VII of Chapter 79, and relating to circuit court levee districts, both provide for the filing of exceptions by land owners to the reports of commissioners appointed to assess benefits and damages in the districts. Such exceptions are heard by the circuit court and its findings are final, except that the owner of land within the district may appeal on question of whether or not just compensation has been allowed for property appropriated, and second, whether proper damages have been allowed for property prejudicially affected by the improvements. Thus, there is no appeal on the question of assessment of benefits.

The scheme provided for fixing of benefit assessments in such cases has been held to afford the land owner due process of law. Bartlett Trust Company v. Elliott, 30 Fed. (2d) 700, 704. In that case the court quoted from the case of Hodge v. Muscatine County, 196 U. S. 276, 25 S. Ct. 237, 49 Law Ed. 477, as follows:

"If the taxpayer be given an opportunity to test the validity of the tax at any time before it is made final, whether the proceedings for review take place before a board having a quasi judicial character or before a tribunal, provided by the state for the purposes of determining such questions, due process of law is not denied."

Therefore, inasmuch as no provision is made in Article 8 of Chapter 79 for appeal from the decision of the county board of equalization to the State Tax Commission, we are of the opinion that the State Tax Commission has no jurisdiction to hear such appeal, and that the action of the commission in the case before it should be to dismiss the appeal for want of jurisdiction.

CONCLUSION.

Therefore, this department is of the opinion that no appeal lies from the county board of equalitation to the State Tax Commission regarding benefits assessed upon formation of county court levee districts under Article 8 of Chapter 79, R. S. Missouri, 1939.

Respectfully submitted,

APPROVED:

ROBERT R. WELBORN Assistant Attorney General

J. E. TAYLOR Attorney General (CP)

RRW/feh

TAX EXEMPT REALTY Realty and personalty not strictly devoted to AND PERSONALTY: purely charitable purposes is not tax exempt.

November 30, 1949

Honorable Clarence Evans
Chairman
Missouri State Tax Commission
Capitol Building
Jefferson City, Missouri

FILED 27

Dear Sir:

This department is in receipt of your recent request for an official opinion, which request is stated by you in the following manner:

> "We received an appeal in the regular manner from the above corporation claiming exemption on both tangible, personal property and real estate. The case was heard on October 18th at Poplar Bluff, Missouri, and we would like to have an opinion from your office.

"We are enclosing herewith copy of the Pro Forma Decree of the above corporation and we have on hand copies of their annual proceedings, which include the balance sheets for the years 1944, 1945, 1946, 1947 and 1948. We will be glad to loan these to your office upon request. We are also enclosing copy of their Petition for Review of Assessment.

"From the evidence given it is apparent that the General Association of General Baptists gave to the corporation in question the machinery with which to operate and \$16,000.00 toward the purchase price of the realty. The corporation in question borrowed from the bank \$10,000 to complete the purchase of the realty. Besides the gifts from the General Baptists, the corporation receives gifts throughout each year from others. They publish several Religious papers, one of which is for the Christian Church, and they state that this is published at cost. The balance of the

papers are furnished for the parent company, the main one of which is known as The Messenger. In addition to these papers they also sell other Religious books and Dictionaries at a profit. They do not publish these Dictionaries and other Religious publications, nor do they keep a supply on hand, but they do accept orders from subscribers and buy this additional merchandise as required. A profit is made on the merchandise ordered, but they contend they are not operating at any great amount of profit, and should their business at any time show a profit of consequence, this money would be turned to the General Association for Religious work.

"We have read with some interest the Evangeline Lutheran Synod case in S.W. 2nd. 196 at page 136. We believe this is a parallel case although the profits are not to be compared. We call your attention again to the fact that this covers both tangible personal and real property.

"Inasmuch as time is getting short on the payment of taxes for this year, we would appreciate an early opinion."

We have here a situation in which the Board of Publications of the General Association of General Baptists, a corporation, which will hereinafter be referred to as the "Board", seeks exemption from taxation of its real and personal property. That property consists of realty purchased several years ago for \$26,000.00, of printing presses and other tools and machines necessary in the printing process. There is no indication of the value of these presses, tools, and machines.

In regard to the above, we would first call your attention to the tax exemption Section of the 1945 Missouri Constitution, which is Section 6 of Article X. That section reads:

"Exemption from Taxation. -- All property, real and personal, of the state, counties and other political subdivisions, and non-profit cemeteries, shall be exempt from taxation; and all property real and personal, not held for private or corporate profit and used exclusively for religious worship, for schools and colleges, for purposes purely charitable, or for

agricultural and horticultural societies may be exempted from taxation by general law. All laws exempting from taxation property other than the property enumerated in this article, shall be void."

This section of the Constitution was effectuated by the Laws of Missouri 1945, page 1799. (Now section 10942.4, Mo. R.S.A. 1939). That section reads:

"The following subjects shall be exempt from taxation for state, county or local purposes: First, lands and other property belonging to this state; Second, lands and other property belonging to any city, county or other political subdivision in this state, including market houses, town halls and other public structures, with their furniture and equipments and on public squares and lots kept open for health, use or ornament; Third, lands or lots of ground granted by the United States or this state to any county, city or town, village or township, for the purpose of education, until disposed of to individuals by sale or lease; Fourth. non-profit cemeteries; Fifth, the real estate and tangible personal property which is used exclusively for agricultural or horticultural societies heretofore organized, or which may be hereafter organized in this state; Sixth. all property, real and personal actually and regularly used exclusively for religious worship, for schools and colleges, or for purposes purely charitable, and not held for private or corporate profit shall be exempted from taxation for state, city, county, school, and local purposes; provided, however, that the exemption herein granted shall not include real property not actually used or occupied for the purpose of the organization but held or used as investment even though the income or rentals received therefrom be used wholly for religious, educational, or charitable purposes."

In its "Petition for Review of Assessment," the Board states:

"That your petitioner claims that the assessment of its tangible personal property and real estate for purposes of state and county taxation violates section 10942.4, R. S. Mo. 1939, amended by the Laws of 1945, in that the said tangible personal property and real property are used for a purpose purely charitable, and therefore, your petitioner prays that a hearing be had in connection with the erroneous assessment of said property, that the owner be notified, that said property be stricken from the tax rolls."

It will be observed that in the above the Board bases its claim to tax exemption solely on the ground that its publishing house is "used for a purpose purely chritable."

Both section 6, Article X of the Constitution, and the Laws of Mo. 1945, both quoted above, state that property, both real and personal, which is used for purposes purely charitable shall be tax exempt.

The question, therefore, which we have to decide is whether this publishing house is used for purposes purely charitable.

Some light is thrown upon this point by the "Articles of Agreement" of the Board. Article IV of this document states:

"This Association is formed for the purpose of the supervision and promotion of the publication and distribution of the General Baptist Messenger, a religious journal published weekly at Poplar Bluff, Missouri, and such other religious literature as shall from time to time be required, and the direction and operation of any future publishing enterprise undertaken by the General Baptist denomination, all of which shall be printed in the English language."

The above article contemplates three separate activities, the first of which is, "The publication and distribution of the General Baptist Messenger, a religious journal published weekly at Poplar Bluff, Missouri."

Subscriptions are sold to this journal and copies sent each week to the paid up subscribers. We assume also that advertising is sold at approximately the same rates charged by secular publications. We assume from your letter that the proceeds from subscriptions and advertising at least meet the cost of publication and distribution. Can it be said that this activity is purely charitable?

Article IV also says that this Board shall publish "such other religious literature as shall from time to time be required."

In your letter you state that these publications are issued by the Board at cost. Can this be said to be a purely charitable activity?

Finally, Article IV authorizes "the direction and operation of any future publishing enterprise undertaken by the General Baptist denomination."

The final clause gives the Board wide latitude indeed in its publishing activities, and it certainly could not be said that under it the Board could not at any future time engage in a profit making enterprise very far removed from "pure charity".

In your letter you state that, "In addition to these papers they (the Board) also sell other Religious books and Dictionaries at a profit." On this latter point, you state that the Board contends that: "They are not operating at any great amount of profit." By the admission of the Board, therefore, they do make some profit on this latter activity. Can it be said that this is the "purely charitable" activity which is contemplated by the Constitution and the Statute quoted above? It seems obvious to us that neither this, nor any of the three activities discussed above, is "purely charitable" within the meaning of the Constitution and the statute.

It is obvious that to support the above observation, we need an authoritative definition of the word "charity." Such a definition is supplied by the Missouri Supreme Court in the case of Salvation Army v. Hoehn, 188 S.W.(2d) 826. There, the Court said:

drawn definition of a charity that has ever been formulated is that it is a gift, to be applied consistently with existing laws, for the benefit of an indefinite number of persons, either by bringing their hearts under the influence of education or religion, by relieving their bodies from disease, suffering, or constraint, by assisting them to establish themselves for life, or by erecting or maintaining public buildings or works or otherwise lessening the burdens of government.

* * * A charity may restrict its admissions to a

class of humanity, and still be public; it may be for the blind, the mute, those suffering under special diseases, for the aged, for infants, for women, for men, for different callings or trades by which humanity earns its bread, and as long as the classification is determined by some distinction which involuntarily affects or may affect any of the whole people, although only a small number may be directly benefited, it is public. ' See also, Robinson et al. v. Crutcher et al., 277 Mo. 1, loc. cit. 8, 209 S.W. 104; Catron et al. v. Scarritt Collegiate Institute et al., 264 Mo. 713, loc. cit. 725, 175 S.W. 571, 573. These cases dealt with charitable gifts, but charity is charity and the legal concept of charity expressed and reflected in these cases is, we think, applicable to the present facts. * * *

In the same case the Court also said:

"'An intention on the part of the legislature to grant an exemption from the taxing power of the state will never be implied from language which will admit of any other reasonable construction. Such an intention must be expressed in clear and unmistakable terms, or must appear by necessary implication from the language used, for it is a well settled principle that, when a special privilege or exemption is claimed under a statute, charter or act of incorporation, it is to be construed strictly against the property owner and in favor of the public. This principle applies with peculiar force to a claim of exemption from taxation. The above from 2 Cooley on Taxation, 4th Ed., Sec. 672, p. 1403, was quoted with approval in the third YMCA case. See also Fitterer v. Crawford, 157 Mo. 51, loc. cit. 58, 57 S.W. 532, 50 L.R.A. 191."

It will be observed that the above definition says that for a thing to be a charity, it must be a "gift." There is no indication whatever that any activity of this Board supplies a "gift" to any one. The Board says of some of its activities that upon them it does not make a profit but operates at "cost." Upon other of their activities they admit that they do make a profit but that it is a small one. They further admit that the Board retains this profit because in your letter you state:

"A profit is made on the merchandise ordered, but they (the Board) contend they are not operating at any great amount of profit, and should their business at any time show a profit of consequence, this money would be turned to the General Association for Religious work."

This subject of property being exempted from taxation because it is being used for religious or charitable purposes has received thorough and exhaustive treatment by the Missouri Supreme Court in the case of Evangelical Lutheran Synod of Missouri, Ohio, and other states et al. v. Hoehn, 196 S.W.(2d) 134. The fact situations in the above case and in the instant case are very similar. In the case cited, the Court says:

"The plaintiffs-appellants are the Evangelical Lutheran Synod of Missouri, Ohio and Other States, and Concordia Publishing House. Both are Missouri corporations organized under Art. 10, Chap. 33, Secs. 5436-5465 covering benevolent, religious, educational and other like corporations. For convenience, we shall refer throughout this opinion to the first named corporation as the Synod, and to the second as the Publishing House. The defendants-respondents are the Assessor, the Comptroller and the Collector of Revenue of the City of St. Louis.

"The Publishing House is a subsidiary corporation of the Synod, the latter controlling, through the board of directors elected by it, all the activities of the former. It is conceded that in their activities the two corporations constitute a single unit. The Publishing House does a specialized printing and publishing business, and holds title to the real estate involved for the use and benefit of the Synod. * * *"

* * * * * * * * * * * * *

"All the buildings are used solely for the purposes of the two corporations. They contain various offices of the Synod, the Publishing House and church organizations; a book library and a sacred music library, used by the clergy, teachers and musicians; a large auditorium used by the Synod;

a large book displays room where books may be purchased at retail; a printing plant, and bindery; stock room; storage and warehouse rooms; engine, boiler and heating plant rooms. All the lots were purchased and the improvements thereon constructed solely out of the profits and surplus of the Publishing House.

"Part of the books sold by the Publishing House are printed and published by it, and part by others. Most of them are religious books. Some are secular, mainly English Classics and Webster's Dictionary, all these being approved by the Synod. It also prints religious periodicals and supplies material to the denominational churches and parochial schools. * * *"

The general similarity between the cited case and the one under consideration is evident.

In holding that the realty of the Publishing House in the cited case was not tax exempt on the ground that it was used for religious or charitable purposes, the Court said in part:

"The prerequisites to tax exemption were: (1) the use of the land itself, not merely its usufruct, for those exclusive purposes; (2) the owner must be dedicated to those purposes. To that extent the ownership characterized the use. If the first were not true, a proper religious or charitable institution could have claimed tax exemption if, for instance, its real estate was merely rented out and the rentals devoted to its objectives --which is not the law. And if the second were not true any business could have made its real estate tax exempt (within the Constitutional area, of course) by consecrating the returns therefrom to religious or charitable uses. Furthermore, the doctrine is practically universal that religious or charitable institutions cannot enter the field of business and operate for profit. Sec. 5444 covering benevolent corporations has provided ever since 1879 that no association formed for business purposes of any kind, or for pecuniary profit in any form' shall be incorporated thereunder.

"But there are, and always will be, borderline cases. The rule in this State is that the plotted

objective of the institution must be exclusively religious or purely charitable; and its activities must be such as integrate with its objective -- that is, fit in without changing its character. Some states inquire merely into the dominant (apparently in the sense of predominant) objective and figure the percentage of different objectives or activities. But our most recent expression of the rule under the 1875 Constitution is in the Y.M.C.A. - Baumann case and the Salvation Army case, where it is said the activities must accord with the primary objective and round it out or dovetail into it -- though slight, temporary, or in a word immaterial, deviations will not be fatal. Appellants cite authority holding the receipt of income by charitable hospitals from patients able to pay will not deprive them of land tax exemption, if their services are equally available to those who cannot pay and if the income is used in furtherance of their charitable purposes. But those cases are not in point because the income there is not profit and is derived from services precisely in line with their chartered objective.

"It seems no Missouri decisions have passed on the status of a publisher of religious literature as a religious or charitable institution entitled to tax exemption. But this subject is covered in an Annotation in 154 A.L.R. 895. The annotation assumes an enterprise of that kind abstractly can be a tax exempt religious or charitable institution and inquires into uses made of its property which various decisions hold will put it in or exclude it from that class. We shall refer to a few of these decisions which are also cited by the parties here. In general it should be understood that in each case the owner of the property was a benevolent corporation or body which engaged in the publishing business for profit, and that the profits were used for its benevolent purposes or those of a parent organization. * * *

The Court also said:

"Now, getting back to the instant case, one of the chartered objectives of the Publishing House is the advancement and extension of knowledge and learning among people generally; and it is authorized to publish and sell (for profit) books and literature, and to acquire and operate real estate and publishing plants for that purpose. Any bona fide schoolbook or encyclopedic publishing concern could qualify under that provision. Nor do we think the situation is altered here by the facts that nearly all the sales for profit were of religious literature and made mostly to members of the denomination. Many books are sold competitively and for profit to a limited public, such as law books to lawyers. Appellants' objectives are commendable, and there is no doubt that a charitable trust may operate for profit. But the only question here is whether the land on which appellants' publishing enterprise is conducted is tax exempt; and our Constitution says tax exempt land must be used exclusively for religious worship or purposes purely charitable. A competitive commercial business operated for profit does not comply with that requirement, even though the profits are devoted to religion."

We call your further attention to the holding of the Missouri Supreme Court in the case of Missouri Goodwill Industries v. Gruner, 210 S.W.(2d) 38. In that case the Court said:

"We agree with appellants that claims for exemption from taxation must be strictly, but reasonably, construed. We also agree that the purposes stated in a corporate charter, while important, are not conclusive; and that if part of the land is used for non-charitable purposes the whole is taxable. * * *

* * * * * * * *

"Appellants contend and cite decisions to show that the purposes of Goodwill do not come within the legal definition of 'charitable' and, specifically, that these purposes were not purely charitable because Goodwill's property was used in business or commerce. Evangelical

Lutheran Synod v. Hoehn, 355 Mo. 257, 196 S.W. (2d) 134, 147, has some but not all the aspects of the instant case. In that case we denied tax exemption to a publishing corporation, organized as a subsidiary of the Lutheran Church, which did an extensive business in competition with commercial printing houses.

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"Appellants offer us many definitions of 'charity.' The term is a broad one and broader now than formerly. Appellants say that there can be no charity in a legal sense if the element of gift is lacking. Even so, a gift of money is not required. We think the element of gift is not lacking under the facts of this case. True, the handicapped employees of Goodwill are not recipients of alms. They render some service for the wages they receive and some of them may render full value. Yet, they are given the opportunity, denied them by the harsh competition of the business world, for employment with some remuneration at the start and with the hope of employment in competitive industry after they are trained. We think that constitutes charity and charity of a practical sort, for it helps the helpless and relieves the State of the burden of their support. * * *

We believe too, that the legal concept of a charity is further illuminated by the Court in the case of Northeast Osteo-pathic Hospital v. Keitel 197 S.W.(2d) 970, in which the Court says:

"In the case of Nicholas v. Evangelical Deaconess Home, 281 Mo. 182, 219 S.W. 643, the articles of association of the Home stated the objects of the association to be the nursing of the sick and the care of the poor and aged by trained deaconesses; and to found and support a home for deaconesses wherein they could be trained and from which they could be sent as nurses, and wherein sick and aged could be admitted and receive attendance. The charitable character and purpose of the Home clearly appeared in the articles of association; and the parol evidence introduced did not show the Home, in its

actual operation, departed from the charitable character and purpose of the organization as shown by its articles of association. In the case of State ex rel. Alexian Bros. Hospital v. Powers, supra, the hospital, which the court did not doubt was a charitable institution, was conducted, by a religious community who devote themselves to the gratuitous care of the sick * * * the indigent poor are its first object. Briefly, it has been said the test in determining whether a hospital or a corporation organized for the purpose of founding and maintaining a hospital is charitable, or otherwise, is whether or not it is maintained for gain, profit, or advantage. 14 C.J.S. Charities, Sec. 2, subsec. e, p. 422. The reading of the Deaconess Home and Alexian Bros. Hospital cases discloses the home and the hospital were conducted without gain, profit, or advantage. But the fact that pay patients are admitted for treatment would not make hospital the less charitable if the hospital were equally available to those who could not pay and if the income were used in furtherance of the charitable purpose. Nicholas v. Evangelical Deaconess Home, supra: State ex rel. Alexian Bros. Hospital v. Powers, supra. See also Evangelical Lutheran Symod et al. v. Hoehn, supra, Mo. Sup., 196 S.W. (2d) at page 144. It is not considered that the term 'charity' in a legal sense is limited to the popular acceptation of the term, that is, the relief of the poor. Salvation Army v. Hoehn, supra; Jackson (It is not herein said a v. Phillips, supra. (It is not herein said a hospital may be a charitable institution if it refuses the admittance of the destitute who are in need of hospitalization; but it is plainly seen a charity may be nonetheless a charity if it serves some lower income, although not destitute class. Salvation Army v. Hoehn, supra.) 於 · 於 · 於 問

Numerous other cases sustaining our conclusion that the personalty and realty of the Board in the instant case is not tax exempt on the ground that it is used for purely charitable purposes could be mentioned, but we believe that those cases which we have cited are conclusive and adequate.

We are fully cognizant, as everyone must be, of the fine, unselfish work done by this particular Board, and many other similar groups of spiritually dedicated men and women, and we believe that every encouragement should be given to their efforts; however, their operations, even as the operations of others more materially minded, must be confined within the law as the law is written, and which we have construed herein.

CONCLUSION

It is the conclusion of this Department that the personalty and realty owned by the Board of Publications of the General Association of General Baptists, a Corporation, is not tax exempt.

Respectfully submitted,

HUGH P. WILLIAMSON Assistant Attorney General

HPW:AN; mw

APPROVED:

J. E. TAYLOR Attorney General LEGISLATURE: There is a vacancy at present in the office of Representative from Cape Girardeau County, and Governor should issue writ of election to fill such vacancy.

January 14, 1949

Honorable J. S. N. Farquhar Member, House of Representatives Jefferson City, Missouri

Dear Sir:

This is in answer to your letter of recent date requesting an official opinion of this department and reading as follows:

"As you, of course, know Mr. Goodwin was elected on the Democratic ticket from Cape Girardeau County as a member of the Legislature, but before he qualified he died; and I would appreciate it if you would advise me if I am to serve the full two years, or if it is necessary to hold a special election."

We believe the case of State ex rel. vs. Thomas, 102 Mo. 85, to be decisive of the question of whether or not there is a vacancy in the office of Representative from Cape Girardeau County. In that case, a person was elected Marshal of St. Louis at a special election. At the time of the special election, there was an incumbent holding over after his term of office had expired, and the incumbent was holding over because no valid election had been held prior to the special election. The court said, 1.c. 91:

"* * * An office is vacant within legal intendment, and for all purposes of election or appointment, as well when the official term of the occupant has expired, as in case of his death, resignation or removal.* * *"

The court further said, 1.c. 92, commenting on the case of State vs. Jenkins, 43 Mo. 261:

"* * * The case just cited, while it plainly decides the point mentioned, necessarily decides, also, that there is a vacancy in an office notwithstanding there is a hold-over incumbent, and a vacancy which may be filled, provided there is a law for the

FILED 28 election of his successor. As already pointed out there is no such impediment in the case before us. Ordinance 1089 is adequate and ample."

In the case of State ex inf. Crow vs. Smith, 152 Mo. 512, the Supreme Court, in commenting on the Thomas case, said, 1.c. 520:

" * * * The case of State ex rel. v. Thomas, 102 Mo. 85, decided that the charter and ordinances of St. Louis, expressly provided for a special election in the exigencies present in that case."

We believe that the Thomas case was decided on the general ground that a vacancy existed which could be filled by election and not on any special charter or ordinances of St. Louis. We believe this position is substantiated by the Supreme Court of this state in the case of State ex rel. Bothwell vs. Green, 180 S.W. (2d) 12, where the court said, 1.c. 14:

"Other cases relied on do not sustain respondent's contentions. State ex rel. Crow v. Smith, 152 Mo. 512, 54 S.W. 221, 47 L.R.A. 550, is decided on the same ground as the Dabbs case which was over-ruled, as we pointed out, by the Amick case and for that reason should not be followed. * * * * "

In the Dabbs case, referred to in the Green opinion, supra, such case being State ex inf. vs. Dabbs, 182 Mo. 359, it was held that where a circuit judge was appointed to serve until a specified date and until his successor was elected and qualified, and the person elected to succeed him died on the day after election and before qualifying, that no vacancy existed and that the appointee served an additional full term of six years.

The Amick case (State ex inf. vs. Amick, 247 Mo. 271), referred to in the Green case, supra, as overruling the Dabbs case, attempted to distinguish the Dabbs case in the main opinion but the concurring opinion of four judges holds that it should be specifically overruled. We believe that it was overruled on the specific point that a vacancy cannot exist where a person is elected but dies before qualifying. The court said, l.c. 295:

" * * * By refinement it might be distinguished, but I think the case wrong on principle, as well as under the statutes and Constitution, and should be so dealt with in the case at bar. * * * "

The case of State ex rel. vs. Seay, 64 Mo. 89, which held that where a circuit judge was elected and qualified but died two days before his term of office began that a vacancy existed because the incumbent successor had been elected and qualified, was strongly relied on in the Dabbs and Smith cases which, as pointed out supra, are held to be overruled by the Amick case. We believe the reasoning of the Seay case also to be overruled insofar as it holds that when a person dies after election but before qualification, no vacancy can exist.

The case of State ex rel. vs. Thomas, which we held supra correctly to state the applicable law, was cited approvingly in State ex rel. vs. Green, cited supra, where the court said, l.c. 14:

" * * * State ex rel. Tredway v. Lusk, 18 Mo. 333, was overruled by State ex rel. Attorney General v. Thomas, 102 Mo. 85, 14 S.W. 108. * * * * "

Section 12 of Article VII of the Constitution, providing that "except as provided in this Constitution, and subject to the right of resignation, all officers shall hold office for the term thereof, and until their successors are duly elected or appointed and qualified," and Section 12820, R. S. Mo. 1939, providing that "all officers elected or appointed by the authority of the laws of this state shall hold their offices until their successors are elected or appointed, commissioned and qualified," mean only that until such time as a successor is elected or appointed and qualified that the incumbent holds over to avoid the interruption of the functioning of the office, but does not mean that no vacancy exists which may be filled when the term of office has expired.

In the case of State ex rel. vs. Thomas, cited supra, the Supreme Court said, l.c. 91:

"The fact that the incumbent remains clothed with official authority, in furtherance of a wise provision of public policy and of

public law, cannot enlarge the boundaries of his official term, or arrest the operation of the power of appointment or of election. Of course, these remarks are subject to the conditions that the law has provided for filling the office in one of the modes mentioned, and that, therefore, the election or appointment cannot be classed as voluntary."

It is therefore our view that a vacancy exists at present in the office of Representative from Cape Girardeau County.

Section 14 of Article III of the Constitution of Missouri, provides as follows:

"Writs of election to fill vacancies in either house of the general assembly shall be issued by the governor."

It is our view, therefore, that a method for filling the vacancy in the office of Representative from Cape Girardeau County is provided for and that the Governor should issue a writ of election to fill such vacancy.

CONCLUSION

It is the opinion of this department that a vacancy exists at present in the office of Representative from Cape Girardeau County and that the present incumbent will continue to serve only until such vacancy is filled. It is further the opinion of this department that the Governor should issue a writ of election to fill such vacancy.

Respectfully submitted,

C. B. BURNS, JR. Assistant Attorney General

APPROVED:

J. E. TAYLOR Attorney General

CBB: VLM

COUNTY COURTS: Associate judges of St. Louis County Court to be elected at general election to be held in 1950.

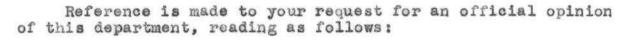
CONSTITUTIONAL LAW: An act found Laws of Mo., 1943, page 509, relating to St. Louis County rendered unconstitutional by adoption of Constitution of Missouri, 1945.

August 18, 1949

9/2/49 FILED 28

Honorable John D. Fels Member, Missouri State Senate 200 North Taylor Kirkwood, Missouri

Dear Sir:



"A question has arisen as to whether those associate or district judges of the County Court of St. Louis County who were elected in 1948, will hold office for two years or four years.

"Prior to 1944, Sec. 2475 R.S. Mo. fixed the terms of all such judges at two years, but Laws of Misseuri, 1943, p. 509, provided that in 1944 and every four years thereafter, county judges in counties of 250,000 to 450,000 population were to be elected for four year terms. Those associate judges of the County Court of St. Louis County, who were elected in 1944, held office under this statute until 1948.

"The 1945 Constitution of Missouri provides in Article VI, Sec. 8., that the organization and powers of each of the four classes of counties shall be defined by general laws, so that all counties within the same class shall possess the same powers and be subject to the same restrictions, and that a law applicable to any county shall apply to all counties in the class to which such county belongs.

"I would like to have your official opinion for the information of the County Court of St. Louis County as to whether Laws of Missouri, 1943, p. 509, governs the term

of the present associate judges of that Court, who were elected in 1948, or whether that statute became ineffective after July 1, 1946, under the provisions of Sec. 2 of the Schedule of the 1945 Constitution."

The general statute providing for the election of associate judges of the county courts in the several counties of the state is found as Section 2475, R. S. Mo. 1939, which reads in part as follows:

"At the general election in the year eighteen hundred and eighty, and every two years thereafter, the qualified voters of each of said districts shall elect a county court judge, who shall hold his office for a term of two years and until his successor is duly elected and qualified; * * * *

Subsequent to the passage of the above quoted statute, an act was passed by the General Assembly, found Laws of Missouri, 1943, page 509, which related to the election of associate judges of the county courts in counties having a population of not less than 250,000 and not more than 450,000 inhabitants. The pertinent portion of such statute, insofar as it relates to the question now under consideration, reads as follows:

"In all counties in this State now having or which may hereafter have a population of not less than 250,000 and not more than 450,000 inhabitants, the qualified voters of each of the districts as provided in Section 2474 of the Revised Statutes of Missouri 1939, shall elect at the general election in the year 1944 and every four years thereafter a county court judge, who shall hold his office for a term of four years and until his successor is duly elected and qualified; * * * "

Reference to the 1940 decennial census discloses that such statute related exclusively to St. Louis County. Insofar as population is concerned, the same situation prevails.

As a part of the Constitution of Missouri, 1945, we find Section 8 of Article VI, which reads as follows:

"Provision shall be made by general laws for the organization and classification of counties except as provided in this Constitution. The number of classes shall not exceed four, and the organization and powers of each class shall be defined by general laws so that all counties within the same class shall possess the same powers and be subject to the same restrictions. A law applicable to any county shall apply to all counties in the class to which such county belongs."

Pursuant to the above quoted constitutional mandate, the General Assembly, by an act found Laws of Missouri, 1945, page 1801, classified the various counties of the state, creating among others Class (1) which embraces both St. Louis County and Jackson County. The classification is based upon valuation.

In this state of the statutory and constitutional provisions, the question is squarely presented as to whether or not the act found Laws of Missouri, 1943, page 509, conflicts with the above quoted constitutional provision and if so, the effect of such conflict upon the act.

It will be noted that the constitutional provision provides that general laws must be enacted defining the mode of organization and powers to be exercised by the counties of the several classifications. Clearly the act found Laws of Missouri, 1943, page 509, is one relating to the "organization and powers" of a county, and, therefore, its constitutionality must be measured by the provisions of Section 8 of Article VI, Constitution of Missouri, 1945. Further, as we have pointed out previously, the act mentioned is limited in its application to only one county forming a part of Class (1).

In State ex Inf. Taylor vs. Kiburz, 208 S.W. (2d) 285, the Supreme Court of Missouri, en banc, had under consideration the effect of Section 8 of Article VI, Constitution of Missouri, 1945, upon a statute existing at the time of the adoption of the Constitution. The statute there under consideration did not contain the vice found in the act here under consideration, viz., that it was inapplicable to all counties of a particular class. As a matter of fact, the statute under consideration

by the Supreme Court in the Kiburz case was actually applicable to all of the counties forming one of the classes established by the General Assembly. However, even that fact did not have the effect of saving such statute. The court said, 1.c. 288:

" # # So, even assuming that the later enacted classification act was sufficient to validate pre-existing Section 8655 as a general law defining the power of counties (with respect to the office of county highway engineer), under Section 8, Art. VI of the Constitution, because applicable alike to every county in the state, the proviso would have to fall because it is neither applicable to all of the counties of the state, nor to any particular class or classes of counties, as defined by the classification act, and, hence, is in no sense a general law within the meaning of the constitutional provision we are considering. The circumstance that the two counties to which the proviso ever applied (St. Louis County and Jackson, each having a population of more than 50,000, taxable wealth exceeding forty-five million dollars, and adjoining or containing a city of more than 100,000 inhabitants) now comprise the whole of "Class 1" counties, as presently constituted, would not save it."

Applying the rule enunciated in the Kiburz case to the statute here under consideration, we reach the conclusion that the same is unconstitutional.

CONCLUSION

In the premises, we are of the opinion that an act, found Laws of Missouri, 1943, page 509, is unconstitutional as being in conflict with Section 8 of Article VI of the Constitution of Missouri, 1945, and that associate judges of the County Court of St. Louis County must be elected at the general election to be held in 1950 under the general provisions of Section 2475, R. S. Mo. 1939.

APPROVED:

Respectfully submitted,

WILL F. BERRY, JR. Assistant Attorney General

J. E. TAYLOR Attorney General July 27, 1949



Honorable Henry H. Fox, Jr. Prosecuting Attorney Jackson County Kansas City, Missouri

Dear Sir:

This is in reply to your request for an opinion, which is as follows:

"There has been some conflict in Kansas City, Jackson County, Missouri, concerning the powers and duties of the Coroner's office, with that of the City Health Department.

"The Coroner's office has requested my office to supply them with an opinion as to their powers and duties. A copy of said opinion I am transmitting to you herewith. I in turn am transmitting to you an opinion drawn by an attorney of this City for the Jackson County Coroners office which was submitted to me together with a form entitled 'Information and Guidance for Coroner Cases.'

"It is my request that you submit to me an opinion of the present law and statutory power of the Coroners office in so far as they relate to each one of the provisions contained in their 'Information and Guidance for Coroner Cases.'"

The statute relating to the duties of coroners is Section 13231, Mo. R.S.A., Laws of Missouri, 1945, page 990, which reads as follows:

"Every coroner, so soon as he shall be notified of the dead body of any person, supposed to have come to his death by violence or casualty, being found within his county, shall make out his warrant,

directed to the sheriff of the county where the dead body is found, requiring him forthwith to summon a jury of six good and lawful citizens of the county, to appear before such coroner, at the time and place of his warrant expressed, and to inquire, upon a view of the body of the person there lying dead, how and by whom he came to his death."

At the outset of this discussion, we think it well to bring to your attention the language of the Supreme Court of Missouri in discussing the jurisdiction of coroners in the case of Boisliniere vs. The Board of County Commissioners, 32 Mo. 375, wherein the court said, l.c. 378:

"The object of an inquest, of course, is to ascertain the cause of death -- whether it was the result of violence or criminal agency; and in order to attain this object, the coroner is necessarily clothed with a discretion on the performance of his duties. The authority of a coroner in this branch of his office is necessarily judicial in its character; (4th Inst. 271; Hale, 65; Giles v. Brown, 1 Mills' C. Rep., 113;) and the obvious importance of this office to the criminal justice of the county must consist, in a great measure, in the discretion with which he exercises its functions in a judicial capacity. To maintain, as does the counsel for the commissioners, that an inquest should be held only in cases of death by violence or casualty, assumes the existence of the fact which can only be determined, in many instances, by such inquests. How is the coroner to be guided in exercising his jurisdiction in a given case? and when is it properly invoked in acting in this capacity? There is not (nor could there be in the nature of things) any classification of circumstances by law circumscribing his action, or fixing precisely the limits of his authority. The nature of his duties and the object to be attained must guide his discretion, acting, as we must presume he does, under a sense of his obligations as an officer and the sanction of an oath.

When called upon to act, he will decline or proceed to the investigation accordingly as the circumstances of the particular case are, or are not, of such a suspicious character as to render proper an official examination, and of these he is the sole judge. But if he act, and the result shows the death to have been caused neither by violence, nor to have been the result of casualty, it does not follow that the inquest was improper, or that his authority was illegally exercised or abused; for the circumstances in this class of cases may furnish no stronger grounds for supposing criminal agency than in cases where the verdict of the jury may disclose a natural The law has imposed no limits on the discretion of the coroner, by means of any preliminary inquiry or otherwise, for the purpose of restricting his action in making inquests; and when he acts, the presumption is he has acted in proper cases."

(Underscoring ours.)

You will note in the underlined portion of the opinion above that the court declared there could not be any classification of circumstances circumscribing the action of the coroner or fixing precisely the limits of his authority.

The general rule concerning the jurisdiction of coroners is set out in 13 Am. Jur. at page 108, as follows:

"The circumstances under which coroners' inquests shall be held are specified in general terms in the statutes relating to the office of coroner. These statutes usually provide for inquests in cases in which death is due, or is supposed to be due, to violence or other unlawful means. The object is to obtain information as to whether death was caused by some criminal act and to obtain evidence to prevent the escape of the guilty, as well as to furnish the foundation for a criminal prosecution in case death is shown to be felonious. is necessary for a coroner to determine whether a statute contemplates the holding of an inquest in a particular case. When

the statutes speak in general terms and do not specify the kind of information on which he is justified in acting, the coroner must necessarily be vested with discretion. Generally speaking, the determination of the question whether an inquest shall be held rests, within certain limits, in the sound discretion of the coroner. If there is reasonable ground to suspect that a death was felonious, it is the duty of the coroner to act. But his duty and power to hold an inquest rest on sound reason and are not to be exercised capriciously and arbitrarily. The mere fact that a body lies dead does not give the coroner jurisdiction, even though death was sudden. There ought to be a reasonable suspicion that it was caused by violent or unnatural means. Nevertheless, the cause of death may be shrouded in such mystery as to warrant the tentative assumption that death was occasioned in a manner which would justify the holding of an inquest to subserve the public ends.

* * * *

" * * * A statute, however, which requires an inquest in case of death by 'violence, casualty, or any undue means' embraces cases of death resulting from chance or accident."

With this general rule in mind and the statement of the court in the Boisliniere case, we proceed to a discussion of the particular provisions contained in the enclosed paper entitled "Information and Guidance for Coroners Cases," which the Coroner of Jackson County has for circulation. The said paper contains a list of cases that the coroner desires to have reported to his office.

Provision (1) thereof is as follows:

"1. All cases which have been unattended by a physician, or which have died suddenly while in apparent health, or which have been under medical attention less than twentyfour hours or have had no medical attendance within 24 hours. Also anyone who has been in a hospital less than 24 hours and not under care of a doctor previous to admittance into hospital."

We differ with this provision in that it specifically provides that "all" such cases should be regarded as coroners' cases. It is obvious that many of the cases listed would, under normal circumstances, not be matters for the coroner's office to investigate unless death was by violence or casualty. The matter would have to be determined in each individual case and would depend upon the apparent cause of death and upon the facts and circumstances preceding and following the death.

As noted in Section 13231, Mo. R.S.A., the coroner has jurisdiction of cases of persons supposed to have come to their death by violence or casualty. In the case of O'Donnell vs. Wells, 21 S.W. (2d) 762, 1.c. 765, the Supreme Court of Missouri declared that "In cases calling for an inquest it would be the duty of the attending physician to notify the coroner."

Provision (2) is as follows:

"2. All suicides or homicides and all cases in which exists a reasonable suspicion as to cause of death, such as: deaths due to bullet wounds, stab wounds, cutting instruments, blunt force, suffocation or strangulation by violence, burns, electrical shocks, poisons, abortions infanticides, and unexpected natural deaths."

instances cases which a coroner has a duty to investigate, certainly suicides and homicides. However, we do not think this would always be so in cases of "unexpected natural deaths." In these cases, we believe that the same rule and reasoning would prevail as in those arising under Provision (1). In the case of Young vs. Pulaski County, 85 S.W. 229, the court, in speaking of jurisdiction of coroners, said, 1.c. 229:

" * * * Lord Denman, speaking as Chief
Justice of the Court of Common Fleas, said:
'The mere fact of a body lying dead does
not give the coroner jurisdiction, nor even
the circumstance that the death was sudden;
there ought to be a reasonable suspicion
that the party came to his death by violent
or unnatural means (citing authorities).
The coroner must therefore, before he summons

a jury, make some inquiry; and if, on that inquiry, he finds that the circumstances which occasioned the death happened out of his jurisdiction, and that there is reasonable suspicion of murder or manslaughter, he ought to abstain from summoning a jury.' * *"

Provision (3) is as follows:

"3. All accident cases, or cases which are the result of external violence of any kind, the period covering same being one year and a day."

The Missouri statute concerning the jurisdiction of coroners embraces deaths by violence or casualty. In most cases arising under Provision (3), the coroner would have jurisdiction of the case in order to determine the criminal liability of any person or persons responsible for the death.

Provision (4) is as follows:

"4. All cases which die of any disease in which an accident or external violence acted as a contributory cause of death."

Here again we believe that such cases are within the purview of the statute directing the coroner to take inquests in deaths by violence or casualty. This is so because it is the nature of the coroner's duty for him to assist in ascertaining whether or not the criminal laws have been violated. Even though the direct cause of death may be from disease, if external violence or casualty was a contributory cause, there might still exist a possibility of criminal prosecution of the one responsible for the casualty or external violence.

We will forego a discussion of Provision (5) at this time as we will go into it extensively later in the opinion.

Provision (6) is as follows:

"6. The Coroner will consider as Coroner's Cases, all such hospital cases which, after a careful detailed examination proves that they cannot be satisfactorily diagnosed, and will consider with his Chief Physician whether necropsy is necessary."

We believe that the cases provided for under Provision (6) might well be considered coroners' cases in the absence of certain limiting circumstances. If the attending physicians secure the permission for an autopsy and are enabled by performing same to determine the cause of death, the coroner would not necessarily have jurisdiction of such cases. His jurisdiction would depend upon the facts and circumstances preceding and following the death and upon the apparent cause of death. If the death was caused by violence or casualty, of course jurisdiction would attach, subject to limitations outlined above. As for consideration as to whether necropsy is necessary, it is well to point out that the coroner has no authority to perform an autopsy except in connection with an inquest. Prenshaw vs. O'Connell, 150 S.W. (2d) 489; Patrick vs. Employers' Mutual Liability Insurance Company, 118 S.W. (2d) 125.

Provision (7) is as follows:

"7. All Hospitals must furnish a detailed Autopsy report to the Coroner's office within five days, whenever a Post has been granted."

We assume that Provision (7) means autopsy reports in coroners' cases. We do not believe that it would be necessary for hospitals to report on autopsies in cases where the result shows that death was due to natural causes and not a result of violence or casualty.

We come now to a consideration of Provision (5), which reads as follows:

"5. UNDER NO CIRCUMSTANCES IS A PHYSICIAN OR HOSPITAL PERMITTED TO ISSUE A DEATH CERTIFICATE ON A CASE COMING UNDER THE JURISDICTION OF THE CORONER."

The coroner has certain duties relative to the certification of death certificates in cases referred to him by the local registrar as those in which the circumstances suggest that the death was caused by other than natural causes. This duty is imposed upon the coroner by a provision of the Uniform Vital Statistics Act found in Laws of Missouri, 1947, Volume II, page 241, which reads as follows:

"If the circumstances suggest that the death or stillbirth was caused by other than natural causes, the local registrar shall refer the case to the coroner for investigation and certification." It is very important that the law relative to certification of deaths be strictly followed as property rights of individuals may be involved, because in certain cases death certificates are relied upon to make a prima facie case where the question involved is the cause of death. Because of this, we will attempt to set out the rule relative to the determination of the proper person to certify a death certificate.

- The Uniform Vital Statistics Act, subsections (2) and (3) of Section 14, Laws of Missouri, 1947, Volume II, page 241, provides as follows:
 - "(2) In preparing a certificate of death or stillbirth the person in charge of interment shall obtain and enter on the certificate the personal data required by the division from the persons best qualified to supply them. He shall present the certificate of death to the physician last in attendance upon the deceased or to the coroner having jurisdiction who shall thereupon certify the cause of death according to his best knowledge and belief. He shall present the certificate of stillbirth to the physician, mid-wife or other person in attendance at the stillbirth, who shall certify the stillbirth and such medical data pertaining thereto as he can furnish.
 - "(3) Thereupon the person in charge of interment shall notify the appropriate local registrar, if the death occurred without medical attendance, or the physician last in attendance fails to sign the death certificate. In such event the local registrar shall inform the local health officer and refer the case to him for immediate investigation and certification of the cause of death prior to issuing a permit for burial, cremation or other disposition of the body. When the local health officer is not a physician or when there is no such officer, the local registrar may complete the certificate on the basis of information received from relatives of the deceased or others having knowledge of the flacts. If the circumstances suggest that the death or stillbirth was caused by other than natural causes, the local registrar shall refer the case to the coroner for investigation and certification.

The language used in the above sections is similar to the language in Sections 9766, and 9767, R. S. Mo. 1939, both repealed by the bill enacting the Uniform Vital Statistics Act. The courts have not as yet interpreted the above provisions of the new act. However, several cases arose under Sections 9766 and 9767. From the law and these cases, we believe that the following rules for the certification of death certificates should be followed when applicable:

- (1) If the diseased dies with a physician in attendance, that physician should sign the death certificate.
- (2) In the event of a stillbirth, the physician, midwife or other person in attendance at the stillbirth, should certify the stillbirth and furnish such medical data as is available.
- (3) If the death occurs without medical attendance, the local registrar should inform the local health officer and refer the case to him for investigation and certification of the cause of death.
- (4) When the local health officer is not a physician or when there is no such officer, the local registrar himself shall complete the certificate.
- (5) If the circumstances suggest that the death or stillbirth was caused by other than natural causes, the local registrar shall refer the case to the coroner for investigation and certification.
- However, it should be noted that in cases arising under (3), (4) and (5) above, the signing of the death certificate should be done by those named officers only in the absence of a physician last in attendance (or in the event that such physician fails to sign the death certificate).

In the case of O'Donnell vs. Wells, 21 S.W. (2d) 762, the Supreme Court of Missouri said, 1.c. 765:

"Defendant insists the medical certificate must be made and signed by the attending physician. Plaintiff thinks the coroner was authorized by section 5803, Rev. St. 1919, to make and sign said part of the certificate of death. Said section does authorize the coroner to make the medical certificate when the case is referred to him by the registrar as a case without an attending physician

and a case where death may have been caused by unlawful and suspicious means. When the coroner is so authorized, he must make the certificate as directed in said section. This duty is incidental to the duties of a coroner under chapter 48 (sections 5916-5957), Rev. St. 1919, which provides for taking inquests of violent and casual deaths. This chapter directs the coroner to perform no duty in aid of the registration of births and deaths.

"Defendant's contention must be sustained. It is clear the lawmakers had in mind the best information obtainable, for they provided in section 5802, Rev. St. 1919, that the medical certificate of the death certificate must be made and signed by the attending physician. They not only commanded the attending physician to make and sign the medical certificate but provided he would be guilty of a misdemeanor if he failed or refused to do so. Section 5817, Rev. St. 1919. In cases calling for an inquest it would be the duty of the attending physician to notify the coroner. It would then be the duty of the coroner to hold an inquest under chapter 48 (sections 5916-5957), Rev. St. 1919. But the holding of an inquest does not authorize the coroner to make and sign the medical certificate unless the case was referred to him by the registrar as provided in section 5803. If there is an attending physician, the medical certificate must be made and signed by him. In the case at bar, there was an attending physician, and he did not make and sign the medical certificate. It was made and signed by the deputy coroner who was not an attending physician. * * * * "

From the above, it can be seen that Provision (5) would not necessarily be true in every instance. The coroner has jurisdiction of deaths caused by violence or casualty, yet the attending physician, if any, would be the proper person to certify the cause of death. Moreover, we wish to make it clear that the determination of the proper person to sign a death certificate does not in any manner limit the authority

of the coroner. He still has a duty to perform in cases of death by violence or casualty and should be notified in all such instances. We believe it well at this time to point out the provision of the law concerning the duty of the local registrar to inform the coroner of cases where the circumstances suggest that a death or stillbirth was caused by other than natural causes. This duty is imposed upon the registrar by the provision of the Uniform Vital Statistics Act, supra, and the act further provides a penalty if he should neglect or refuse to refer the case to the coroner. Section 38 (3), Laws of Missouri, 1947, Volume II, page 246, reads as follows:

"Except where a different penalty is provided in this section, any person who violates any of the provisions of this act or neglects or refuses to perform any of the duties imposed upon him by this act, shall be fined not more than \$100."

Respectfully submitted,

JOHN R. BATY Assistant Attorney General

APPROVED:

J. E. TAYLOR Attorney General

JRB: VLM

CRIMINAL LAW: Magistrate has power to issue commitment after stay of execution extending throughout entire

MAGISTRATES: period of sentence. Power to issue commitment does not expire with expiration of time of origi-

nal sentence when execution has been stayed.

September 1, 1949

Honorable Henry H. Fox, Jr. Prosecuting Attorney Jackson County Courthouse Kansas City, Missouri

FILED 30

9/3/49

Dear Sir:

Reference is made to your request for an official opinion of this department propounding the following question:

"A defendant is given six months in the Jackson County Jail by a magistrate; the magistrate on his own motion grants a stay of execution to the defendant. Assuming that the six months stay of execution remains in full effect for the full period of six months, is the defendant then required to be committed or has his sentence been fully complied with."

Magistrate courts were created by Section 18 of Article V of the Constitution of Missouri, 1945. This provision reads in part as follows:

"There shall be a magistrate court in each county. * * * * * "

Pending action to be taken by the General Assembly, the jurisdiction and procedure in such courts was controlled by Section 20, Article V of the Constitution of Missouri, 1945, reading in part as follows:

"Until otherwise provided by law consistent with this Constitution, the practice, procedure, administration and jurisdiction of magistrate courts, and appeals therefrom, shall be as now provided by law for justices of the peace; * * * * "

Section 21, Article V of the Constitution of Missouri, 1945, provides as follows:

"The general assembly shall provide for the administration of magistrate courts consistent with this Constitution." We have examined the various statutory enactments of the intervening legislatures since the adoption of the Constitution of 1945 and with the exception of authorizing magistrate courts to grant stays of execution pending appeals, we do not find that specific authority has been granted such courts with respect to the question which you have proposed. It, therefore, becomes necessary to resort to unrepealed statutes relating to justice of the peace courts whose provisions will be controlling with respect to magistrate courts under the provisions of Section 20, Article V of the Constitution of Missouri, 1945, quoted supra.

In this regard, your attention is directed to Section 4129, R. S. Mo. 1939, which yet remains in full force and effect, and reads as follows:

"In case of a conviction for any offense where the punishment has been fixed at a fine or imprisonment in the county jail, or workhouse, or by both such fine and imprisonment, the court in which any such conviction was had, or the judge thereof in vacation, or any justice of the peace before whom such conviction was had, may, for good cause shown, by order entered of record, or in writing signed by such judge or justice, grant a stay of execution on any such judgment of conviction and sentence thereon for a definite period of time to be fixed by the court, judge or justice granting the same, not to exceed six months, upon the defendant or some person for him entering a recognizance conditioned for his surrendering himself in execution at the time and placed fixed by the judgment of such conviction or sentence on a day to be named in such order."

(Underscoring ours.)

In the construction of this statute insofar as the computation of time to be credited to a defendant to whom a stay of execution has been granted, we find some lack of harmony in the appellate court decisions. In Ex parte Perse, 286 S.W. 733, decided by the Springfield Court of Appeals, August 31, 1926, the facts may be summarized as follows:

On May 26, 1925, the defendant was sentenced to the county jail for a six-months' period. A void stay of execution was granted by the court for a period of 90 days. Subsequent to the expiration of the 90 days' stay, a commitment was issued. The defendant brought habeas corpus claiming among other things that he was entitled to credit upon his original sentence of six months for the period of intervening between the date of judgment and sentence and the issuance of the commitment. The court concurred in this position saying, 1.c. 736:

" * * * The commitment, however, should not be held void, because not issued immediately; but, in our judgment, it could be issued at any time within the six months, and would, when issued, authorize the arrest and confinement of defendant in jail for the remainder of the 6 months. At the end of that time the defendant should be released. * * * "

Previous to the decision quoted above, the same court had decided Ex parte Ben Bugg on April 1, 1912, reported 163 Mo. App. 44. Again briefly summarizing the facts, we find them to be as follows:

Defendant was convicted upon two charges on January 18, 1909, in the Circuit Court of Howell County. In one case, a fine of \$300.00 was assessed. For failure to pay this fine, defendant was committed and remained in jail until April 16, 1909. No order staying the execution of the judgment rendered in the companion case in which he had also been found guilty and sentenced to six months in jail was made. Subsequently, on April 16, 1909, it being thought that defendant was contracting tuberculosis, he was paroled and permitted to leave the state. On February 23, 1912, a capias execution was issued upon the judgment and sentence fixing defendant's punishment at six months in the county jail. Defendant brought habeas corpus claiming among other things that by reason of the failure of the court to order his immediate commitment after imposition of sentence to the county jail that in legal effect such sentence had been complied with owing to the lapse of time. The court, in disposing of this matter, said:

" * * * Viewing the case from this standpoint the first question which presents itself is whether in contemplation of law the sentence had been complied with. has been held that when a jail sentence is imposed the date of imprisonment begins on the day the sentence is pronounced and that after the lapse of the time for which imprisonment was imposed the prisoner has in legal effect served the sentence whether he has been confined in prison during the time or not. (Re Webb, 89 Wis. 354.) are not disposed to follow that case. the absence of some other statutory provision, the judgment of a court imposing a jail sentence can only be satisfied by a compliance with its terms. * * * * * The question then arises whether there should be any limit to the time within which a judgment may be enforced under such circumstances. If there is to be no limitation then a case might arise in which, years after the judgment had been pronounced, and possibly, after a man had reared a family and attained to a position of high standing in the community, he and his family might be humiliated and disgraced by the bringing to light of an old judgment long since forgotten and which, in all good conscience, ought never again to see the light of day. To say that under such circumstances a man should be cast into prison to satisfy an outraged law would be as absurd as to hold on the other hand that society could have no protection against the honest mistakes or willful neglect of the officers it commissions as the guardians of its welfare. * # # # # # # # # # # # The interests of both the defendant and society must be protected and while the defendant has guaranteed to him a speedy and fair trial, yet when he has been legally convicted and his punishment assessed, society cannot be deprived of the protection guaranteed to it by the speedy and certain punishment of offenders against its laws except for some valid reason. We do not think that mere delay in the infliction of the

punishment assessed is a sufficient reason for relieving the convicted party from the consequences of a judgment against him unless the delay has been so great that society could derive no good from its enforcement, but when such delay has occurred without the fault of defendant, although with his consent, we should have no hesitancy in refusing to enforce the judgment. criminal laws of this state are not based upon any idea of retaliation against the offender for the wrong he has done, but punishments are inflicted solely for the protection of society and when the execution has, without the fault of defendant, been so long delayed that society can no longer have any interest in its enforcement there would seem to be no good reason why its enforcement should be insisted upon. * * * * * * * "

After announcing these principles, the court ordered the petitioner discharged after making the following observation, l.c. 51:

" * * * We do not mean to be understood as holding that the lapse of three years or any specific time should be sufficient or be required in all cases to bar the enforcement of a judgment similar to this one, but each case should rest upon its own peculiar facts and such course followed as will best promote the ends of justice. * * "

Subsequently the same court decided State vs. Smith on August 13, 1927, the opinion being reported 297 S.W. 711. The facts there presented were as follows:

On March 23, 1926, defendant, upon a plea of guilty, had been sentenced to a term of six months imprisonment in the county jail. The Circuit Court of Pemiscot County, before whom the conviction was had, granted an indefinite stay of execution on the jail sentence. The order granting the stay was rescended on the 28th of December, 1926, and the defendant ordered committed. A writ of error was sued out and the cause decided upon the record. Here again the contention was made that the order of commitment

was void for the reason that more than six months had elapsed since the date of judgment. The court, in disposing of this contention, said, 1.c. 712:

"The order made September 28, 1926, setting aside the stay of execution, was made more than six months after the judgment and sentence. It might be urged that, since the punishment was fixed at six months, defendant has, in contemplation of the law, served his sentence, and therefore the order by which he was committed to jail is void. The only cases in this state, in so far as we have found, in which this identical question arose are Ex parte Bugg, 163 Mo. App. 44, 145 S.W. 831, decided by this court, and Ex parte Brown, 297 S.W. 445 (not officially reported), handed down at the present term of this court. In the Bugg Case, supra, in an able opinion by Judge Cox, it was held that the defendant 'was not technically in jail while he was, in fact, at liberty, and the lapse of the time after sentence for which he was adjudged to be confined in jail did not release him from liability to be retaken and required to serve the remainder of the Loc. cit. 48 (145 S.W. 832). The time.' same rule was followed in Ex parte Brown. While there is substantial authority from other states, contra, we perceive no sufficient reason for disturbing the previous rulings of this court. In the case at bar, where but six months and five days! time had elapsed, the question of long lapse of time between the original sentence and subsequent 'infliction of punishment' does not arise as in the Bugg and Brown Cases, supra."

Peculiarly enough, no reference is made in this case to Ex parte Perse, cited supra. From the language used, however, it seems that the rule as established by these various cases may be said to be that the mere expiration of the period of the original sentence as to which a stay of execution has been granted does not ipso facto amount to compliance with the terms of the sentence nor deprive the magistrate of power

Hon. Henry H. Fox, Jr.

to issue a commitment, but rather that it is only in the event that the peculiar circumstances attendant upon a particular case such as those which were found in the Bugg case, supra, will justify the appellate court in quashing such commitment and order the discharge of the convicted misdemeanant.

CONCLUSION

In the premises, we are of the opinion that the expiration of the six-months, period mentioned in your inquiry during which a stay of execution has been in effect does not amount to a compliance with the original sentence, and the defendant should thereupon be committed.

we are further of the opinion that in the event a great period of time has elapsed subsequent to the termination of the period of the original sentence, but during which the convicted misdemeanant was not incarcerated by reason of a stay of execution having been granted, or by reason of peculiar circumstances surrounding the granting of the stay of execution, such as to make it inequitable or contrary to the public policy of the State of Missouri that such commitment be issued, that no commitment should in fact be issued. With respect to this paragraph of this opinion, it is our thought that each case must be considered upon its own facts.

Respectfully submitted,

WILL F. BERRY, JR. Assistant Attorney General

APPROVED:

J. E. TAYLOR Attorney General

WFB:VLM

MOUDR VEHICLES:

Placing of motor number)
on unnumbered motor as-)
signed by state of Iowa)
to motor installed in)
that state, said motor)
now being located in)
State of Missouri

Stamping of motor number on motor located in State of Missouri, which motor had previously been installed in automobile in state of Iowa, the automobile having subsequently been sold to a Missouri dealer, and in turn sold by said dealer to a resident of Missouri not in conflict with Missouri law, and upon showing of proper evidence of assignment by proper authorities in state of Iowa of said number to the said motor, and proper evidence of ownership of automobile by present owner, certificate of registration should be issued to said owner by Missouri Motor Vehicle Department.

March 3, 1949.

Honorable Ronald J. Fuller Prosecuting Attorney Phelps County Rolla, Missouri

Dear Sir:

This will acknowledge your letter of February 10, 1949, in which you request an opinion of this department. Your letter is as follows:

"Request an opinion from Attorney-General Department on the status of title to a motor vehicle.

"Facts": A local used car dealer sold to a local buyer, a used car which the dealer had purchased in the State of Iowa. The car when sold to the dealer bore no motor number, on the certificate of title, nor on the motor itself, and was re-sold to the local purchaser in the same condition. Upon investigation it was found that the motor had been replaced in Iowa, but the number had not been placed on the new motor while the car remained in Iowa. The used car dealer returned to Iowa and obtained the motor number for the certificate of title.

"Question": May the Iowa motor number be placed on the motor while the car is situated in the State of Missouri without complying with the provisions of Section 8397, R.S. 1939?"

3/

We have considered the question propounded by you and have taken into consideration section 8397, R.S.A. Mo., 1939, which section you cited. Said section is in part as follows:

"Nothing in this article shall be construed to prohibit the owner of a certificate of title to a motor vehicle heretofore issued by the Secretary of State of Missouri, or hereafter issued by the Director of Revenue from removing the motor engine from such motor vehicle and replacing same by a reconditioned motor or engine of the same make or manufacture, and giving such replaced motor or engine the same number as the removed motor or engine bore on having same installed."

The remaining portion of the section quoted is devoted to the proscribing of the procedure to be followed in giving the number of the old motor to the newly installed motor. We are of the opinion that said section 8397 above quoted is not applicable to the facts outlined in your opinion request because, as will be seen from the language of the statute quoted above, the applicability of said section is limited to those owners of certificates of title whose certificates of title were issued by the Secretary of State of the State of Missouri, or the Director of Revenue of the State of Missouri, and do not extend to those owners whose certificates of title were issued by another state, as was the case with the local dealer to whom you refer in your letter, who acquired his certificate of title in the state of lowa.

We are of the opinion that the statute applicable to your state of facts is section 8369, R.S.A., Mo., 1939. The following is a quotation therefrom:

"(a) Every owner of a motor vehicle" " "
which shall be operated or driven upon the
highways of this state shall " " " cause
to be filed " " " in the office of the commissioner, an application for registration

on a blank to be furnished by the commissioner for that purpose containing (1) a brief description of the motor vehicle to be registered, including the name of the manufacturer, the motor number and character, the amount and * * * (2) the name, residence and business address of the owner of such motor vehicle; * * * (3) * * *.

(b) Upon the filing of such application, exhibition of certificate of ownership and payment of the fees hereinafter provided, the commissioner shall assign a number to such motor vehicle, and without other expense to the applicant shall issue and deliver to the owner a certificate of registration in such form as the commissioner shall prescribe, * * *.

As will be seen from the language last above quoted, the application for the certificate of registration must show the motor number, and before said certificate of registration shall be granted, the certificate of ownership must be exhibited to the commissioner, or representative.

Ordinarily the certificate of title of the vender would show the motor number, but in the case described by you such certificate of title of the Missouri dealer, which was made to him in Iowa, did not show the motor number for the reason that a motor different from the motor originally in the antomobile had been installed in said automobile in the state of Iowa, which newly installed motor had no number, and for the further reason that the matter of having a new number assigned to said motor by the state of Iowa had been neglected.

Your statement of facts in your opinion request shows, however, that the local dealer in your county who acquired the automobile in Iowa has now procured the assignment of a

motor number to the newly installed motor in Iowa, and we assume that this new motor number was procured from the Motor Vehicle Department of that state, and has been regularly procured in compliance with the Iowa law.

CONCLUSION.

Under the circumstances above outlined partly stated by you and partly assumed by us, we are of the opinion that it is proper for the new motor number recently assigned by the Motor Vehicle Department of the state of Iowa to be stamped on the motor while located, as it now is, in this state. We are of the further opinion that when proper evidence of ownership by the present owner, together with proper evidence of the assignment of the motor number to the motor by the proper authorities in the state of Iowa, and also evidence of the presence of the assigned number on the motor itself is presented to the Commissioner of Motor Vehicles of the State of Missouri, or his duly constituted representative, a certificate of registration should be issued to the owner.

Respectfully submitted

SAMUEL M. WATSON Assistant Attorney General

APPROVED:

J. E. TAYLOR Attorney General

SMW:p

COUNTY COURTS:

County court does not need to submit plans and specifications for manner of removal of a portion of a county building. The circuit judge of Adair county does not have the power to order an additional ten cent levy over and above the fifty cent levy allowed by law.

March 7, 1949

3.9



Mr. W. C. Frank Prosecuting Attorney Adair County Kirksville, Missouri

Dear Sir:

This will acknowledge receipt of your letter of recent date in which you request an official opinion upon the following questions:

- 1). Must the county court of Adair county, at the time that it advertises for bids for the removal of the tower on the court house of Adair county, located in Kirksville, Missouri submit plans and specifications designating the manner in which the removal of the seid towner shall be made?
- 2). Does the circuit judge of Adair county have the power to order, for the purpose of defraying the cost of the removal of the tower, referred to in question 1, an additional ten cent levy over and above the fifty cent levy allowed by law?

Section 13730, R. S. Mo. 1939, states:

"The county court of each county shall have power, from time to time, to alter, repair or build any county buildings, which have been or may hereafter be erected, as circumstances may require, and the funds of the county may admit; and they shall, moreover, take such measures as shall be necessary to preserve all buildings and property of their county from waste or damage."

The above section has been sustained by the case of State ex rel. v. Bollinger, 219 Mo. 204, and by numerous subsequent cases.

Section 13723, R. S. Mo. 1939, states:

"When the ground for erecting any public building shall be designated, as aforesaid, the superintendent shall prepare and submit to the county court a plan of the building to be erected, the dimensions thereof, and the materials of which it is to be composed with an estimate of the probable cost thereof."

It will be noted from the above section that when a county court advertises for bids for the erection of county buildings, plans and specifications for the proposed buildings must also be submitted. However, there is nothing in Missouri law to indicate the necessity of submitting plans and specifications for the tearing down of a county building or a portion thereof. It is, therefore, the opinion of this office that the county court of Adair county, when it advertises for bids for the removal of the tower of the Adair county court house, need not submit plans and specifications indicating the manner of removal.

Your second question, quoted above, is:

"Does the circuit judge of Adair county have the power to order, for the purpose of defraying the cost of the removal of the tower, referred to in question 1, an additional ten cent levy over and above the fifty cent levy allowed by law?"

Section 11041, R. S. Mo. 1939, states:

"No other tax for any purpose shall be assessed, levied or collected, except under the following limitations and conditions, The prosecuting attorney or county viz.: attorney of any county, upon the request of the county court of such county -- which request shall be of record with the proceedings of said court, and such court being first satisfied that there exists a necessity for the assessment, levy and collection of other taxes than those enumerated and specified in the preceding section -- shall present a petition to the circuit court of his county, or to the judge thereof in vacation, setting forth the facts and specifying the reasons why such other tax or taxes should be assessed. levied and collected; and such circuit court or judge thereof, upon being satisfied of the necessity for such other tax or taxes, and that the assessment, levy and collection thereof will not be in conflict with the Constitution and laws of this state, shall make an order directed to the county court of such county, commanding such court to have assessed, levied and collected such other tax or taxes, and shall enforce such order by mandamus or otherwise. Such order, when so granted, shall be a continuous order, and shall authorize the

annual assessment, levy and collection of such other tax or taxes for the purposes in the order mentioned and specified, and until such order be modified, set aside and annulled by the circuit court or judge thereof granting the same: Provided, that no such order shall be modified, set aside or annulled, unless it shall appear to the satisfaction of such circuit court, or judge thereof, that the taxes so ordered to be assessed, levied and collected are not authorized by the Constitution and laws of this state, or unless it shall appear to said circuit court, or judge thereof, that the necessity for such other tax or taxes, or any part thereof, no longer exists."

In the case of State ex rel. Hill v. Wabash Railway Company, 169 Mo. 563, 1.c. 577, this section was construed by the court as follows:

"It was held in the cases relied upon by plaintiff, viz., State ex rel. Brown v. Mo. Pac. Ry. Co., 92 Mo. 137; State ex rel. Givens v. Wabash St. L. P. Ry. Co., 97 Mo. 290; State ex rel. Hamilton v. H. & St. Joe Ry. Co., 113 Mo. 297; State ex rel. V. St. L. K. & N. W. Ry. Co., 130 Mo. 243; State ex rel. v. Bridge Co., 134 Mo. 339, and Andrew County ex rel. v. Schell, 135 Mo. 38, that a proceeding in conformity with section 7654, supra, was the proper course to pursue in order to require a county court to make a special levy for the purpose of paying outstanding and unpaid warrants, but it was not held in any of those cases that such a levy in excess of the constitutional limit would be valid, but it seems to have been taken for granted that it would be. Now, if under such circumstances, the county court had the power to make a special levy of twenty cents on the hundred dollars valuation of property in the county in addition to the levy of forty cents. the constitutional limit, it could of course upon the same theory and by the same authority levy fifty or one hundred per cent and thus ignore those wholesome provisions of our Constitution which were intended to protect

the property rights of the people, and to prevent its confiscation by an evasion of that instrument. That no such purpose was contemplated by the statute is indisputable, but what was meant thereby was that a special levy in addition to a general levy, when the latter does not come up to the constitutional limit, may be made for the purpose of paying past indebtedness of the county, provided it, including the general levy, or the levy for general purposes, does not exceed the constitutional limit."

It is, therefore, the opinion of this office that the answer to your second question is "No".

CONCLUSION

It is the opinion of this office that when the county court of Adair County advertises for bids to remove the tower of the court house of Adair county it need not submit plans and specifications indicating the manner of the removal thereof.

It is the further opinion of this office that the circuit judge of Adair county does not have the power to order an additional ten cent levy over and above the fifty cent levy allowed by law.

Respectfully submitted,

HUGH P. WILLIAMSON Assistant Attorney General

APPROVED:

J. E. TAYLOR Attorney General

HPW:mw

COURTS *

ROADS AND BRIDGES, COUNTY) County court may suspend funds for constructing a road on land occupied by county hospital.

May 6, 1949



Honorable Ronald J. Fuller Prosecuting Attorney Phelps County Rolla, Missouri

Dear Mr. Fuller:

Your letter at hand requesting an opinion of this department which, in part, reads:

> "Would appreciate an opinion from the Attorney General Department for the State of Missouri based upon the following facts and question:

> Facts -- A county hospital for Phelps County, Missouri is to be built within the near future at Rolla, Missouri. The deed to the tract of land upon which the hospital will be built is held in the name of the Trustees of the Phelps County Public Hospital. The Trustees of the hospital desire that the Phelps County Court expend county funds for the construction of a drive on the hospital premises.

Question -- May a County Court expend county funds for a road on land, the title of which is in trustees of a county public hospital."

We assume that the construction of the county hospital in Phelps County is being accomplished in the manner as provided by Article IV, Chapter 126, R. S. Mo. 1939, and those sections repealed and reenacted relating to the establishing and maintaining of county hospitals. If such is the case, the county hospital is a project of the county for public purposes, and the hospital and land on which it is located is the property of the county which by law is controlled, managed and maintained by the hospital trustees, thus, Section 15192, Laws of Mo. 1945, page 984, in part, provides:

> "The county courts of the several counties of this state are hereby authorized, as provided in this Article, to establish, construct, equip,

improve, extend, repair and maintain public hospitals, and may issue bonds therefor as authorized by the general law governing the incurring of indebtedness by counties. * * *"

And, Section 15193, Laws of Mo. 1945, page 984, and Section 15194, Laws of Mo. 1945, page 985, provide for the appointment and election of the hospital trustees and endows them with the power to supervise and maintain the county hospitals.

Consequently, in considering the question of the county court appropriating funds of the county for the construction of a road on land that is to be the situs of the county hospital, it is our thought that we are not confronted with the question whether or not the county court would be granting public money to a corporation, association or individual in violation of Sections 23 and 25, Article VI, of our present Constitution.

The general rule regarding the construction, improvement and repair of roads or highways is given in 29 C. J., page 583, as follows:

"The construction, improvement, and repair of highways is regulated largely by statute, the general rules relating to statutes being applicable, as to constitutionality and construction, which must be reasonable. * * *"

It is, therefore, necessary that we look to the statutes to determine whether the county has the right to expend funds for the construction of a road on the land to be occupied by the county hospital.

Section 8527, Laws of Mo. 1945, page 1479, provides for the setting up of a public road and bridge fund and reads as follows:

"In addition to other levies authorized by law, the county court in counties not adopting an alternative form of government and the proper administrative body in counties adopting an alternative form of government, in their discretion may levy an additional tax, not exceeding thirty-five cents on each one hundred dollars assessed valuation, all of such tax to be collected and

turned into the county treasury, where it shall be known and designated as 'The Special Road and Bridge Fund' to be used for road and bridge purposes and for no other purpose whatever; provided, however, that all that part or portion of said tax which shall arise from and be collected and paid upon any property lying and being within any special road district shall be paid into the county treasury and four-fifths of such part or portion of said tax so arising from and collected and paid upon any property lying and being within any such special road district shall be placed to the credit of such special road district from which it arose and shall be paid out to such special road district upon warrants of the county court, in favor of the commissioners or treasurer of the district as the case may be; Provided further, that the part of said special road and bridge tax arising from and paid upon property not situated in any special road district and the one-fifth part retained in the county treasury may, in the discretion of the county court, be used in improving or repairing any street in any incorporated city or village in the county, if said street shall form a part of a continuous highway of said county leading through such city or village."

In reading the above section, it appears that a portion of the tax moneys collected and designated as the "Special Road and Bridge Fund" is placed to the credit of special road districts and paid out to them on warrants. According to the statute, this amount is four-fifths of the tax collected on property lying within the special road districts, and this tax money can only be returned to the special road districts in which they are collected. State ex rel. v. Vinson, 198 S. W. (2d) 232; Rolla Special Road District v. Phelps County, 116 S. W. (2d) 61, 342 Mo. 549; Hawkins v. Cox, 66 S. W. (2d) 539, 334 Mo. 640; State ex rel. v. Burton, 222 S. W. (2d) 844, 283 Mo. 41.

However, the remaining one-fifth not returned or paid to the special road districts and all of the tax moneys collected on property not lying in the special road districts is retained by the County Treasurer in the "Special Road and Bridge Fund," and as the statute provides "to be used for road and bridge purposes and for no other purpose whatever."

We, therefore, believe that the county court has the discretionary power to disburse the remaining tax moneys in the "Special Road and Bridge Fund" so long as they are confined to the use prescribed by the statute, to wit: for road and bridge purposes.

In Green City v. Martin, 237 Mo. 474, the Supreme Court was considering a similar statute in connection with a constitutional amendment and its application to a county under township organization. At 1. c. 484, the court said:

" * * # The sections speak of the tax as one over which, touching its levy, the county or township has a discretionary power. Therewith they connect themselves in words and thought directly with the amendment. Moreover, section 11,770 is the mandate (and only mandate) of the lawmaker defining the officials into whose hands the constitutional tax passes, and who are charged with the disbursement thereof in a way to subserve the constitutional purpose. It ordains, inter alia, that 'all moneys arising therefrom shall be by the county court or township board of directors appropriated, set apart and kept . . . and . . . used for road and bridge purposes, and for no other purposes whatever. ' That language rivets the statute to the constitutional amendment, and, in its administrative details, points to the township board as the legal custodian and disburser of the special fund. # # #"

From the opinion request submitted we are not definitely informed of the extensiveness of the proposed road to be constructed. It would seem that the building of driveways, walks, and ramps connecting with the hospital building that would facilitate its efficient operation and which would afford adequate means of ingress and egress to the building proper would normally be constructed by the contractor erecting the hospital and would be a part of the normal and usual construction to be performed under the contract.

CONCLUSION.

However, it is the opinion of this department that if the construction of a public road upon the land to be occupied by the

county hospital is contemplated, and for the general public use, the county court at its discretion may use the tax moneys in the "Special Road and Bridge Fund" not credited to special road districts, if such fund has been created as provided in Section 8527, Laws of Mo. 1945, page 1479, for the purpose of constructing said road. To use said funds for such a project would be a use falling within the ambit of the statute, i.e., for road and bridge purposes.

Respectfully submitted,

APPROVED:

RICHARD F. THOMPSON Assistant Attorney General

J. E. TAYLOR Attorney General

RFT/few

CRIMINAL LAW: When one-ball pinball machine is a gambling device gambling: under Section 4678, R. S. Mo. 1939.

September 15, 1949

Honorable Ronald J. Fuller Prosecuting Attorney Phelps County Rolla, Missouri



9/14/49

Dear Sir:

Your letter at hand requesting an opinion of this department which in part reads:

"I would appreciate very much an opinion from the Attorney General's department in regard to the following question:

"'Is a one-ball pin ball machine, commonly known as the "Horse Race Game", a gambling device within Section 4678, Revised Statutes of Missouri, 1939?'"

In our telephone conversation after your request had been received, the description and operation of the particular device or game was understood to be substantially as follows:

The machine in appearance resembles the usual type of pinball machine commonly seen in various places of business, in that it stands on four legs with its playing board in an inclined horizontal position and under glass. At the end of the playing board opposite from the player is an up-right panel on which the play is indicated. On the device in question, the player inserts a five-cent piece in the slot, which is then pushed into the machine; lights flash on the up-right panel, and when they finally stop flashing, a number of a particular horse which has a corresponding number on the playing board remains lit, together with odds being shown as win, place or show, and possibly one other. The player then shoots one steel ball with the use of a plunger under spring tension, thus projecting it upon playing board where it bounces in various directions as a result of striking up-right obstacles or bumpers, and finally drops into a hole or goes clear through without falling into a hole to come to rest in a trough at the rear end of the machine or the end from which the player operates it.

Should the ball drop into a numbered hole on the playing board corresponding to the horse number lit on the up-right

panel, he would win according to the odds shown depending on whether the numbered hole into which the ball fell was in the win, place or show column. If the ball goes on through or does not fall in a numbered hole corresponding to the horse number illuminated on the up-right panel, the player does not win. Another feature of this particular machine is that the player, after inserting the first coin and determining the number of the horse and the odds, may, before shooting the ball, insert another coin or several more up to five and each time increase the odds on the designated numbered horse. If, when he then shoots the ball, it falls in the numbered hole corresponding to the horse number appearing on the up-right panel, he would benefit by the increased odds which he established by inserting the additional coins or nickels.

The specific question presented in your opinion request asks if such a machine is a gambling device within the meaning of Section 4678, R. S. Mo. 1939, which section provides as follows:

"Every person who shall permit any gaming table, bank or device to be set up or used for the purpose of gaming in any house, building, shed, booth, shelter, lot or other premises to him belonging or by him occupied, or of which he hath at the time the possession or control, shall on conviction, be adjudged guilty of a misdemeanor and punished by imprisonment in the county jail or workhouse for not more than one year nor less than thirty days, or by fine not exceeding five hundred dollars or less than fifty dollars."

Looking to the characteristics of the machine in question and the means of operating it, it is apparent that the player's winning is dependent almost entirely on the element of chance.

With the insertion of the coin in the machine, the selection of the winning horse or number and its odds is purely a matter of chance so far as the player is concerned. Furthermore, when the player projects the ball upon the playing board by means of a plunger, the path or course of the ball and where it eventually stops is completely out of the player's control, and its falling into the winning hole is again a matter of chance. At most, any control that the player exercises over the ball is so inconsequential that the courts have not considered it sufficient to make such machines games of skill rather than games of chance.

A comprehensive discussion of the characteristics of pinball machines, a type of which we are now considering, and their operation appears in 135 A.L.R. 104, Part III in Note 4. Cases from many jurisdictions are cited and representative of their decisions is the case of State vs. Coats, 158 Ore. 122, 74 Pac. (2d) 1102, where it is said, Pac. (2d) 1.c. 1105-1106:

"To say that the operation of pin ball machines or slot machines involves any substantial degree of judgment or skill severely strains the credulity of any reasonable-minded person. Such machines are constructed to win, and they do win. In a game involving skill or judgment, the player has a fair opportunity to win. Such opportunity is not afforded the player who bucks' a slot machine or a pin ball machine. No judgment or skill which the player may exercise has any appreciable effect upon the result. It is, to all intents and purposes, a matter of chance."

* * * * * * * * * * * * * * *

"It is perfectly obvious from the information that the only act which the player can, by possibility, perform to influence the result of this operation is to pull back the plunger a greater or lesser distance, and thereby, in its initial stages, regulate the speed of the ball. He can send the ball to the playing surface at greater or lesser speed, but he cannot guide or influence its course after it gets there. He cannot aim at anything, as in a game of billiards, or baseball or golf, but is absolutely limited by the mechanics of the device to propelling the ball along the socalled channel to the upper end of the table.

"If it be conceded that an exceptional person might, after long practice, develop such proficiency in the business as to be able on occasion to influence the result of the play in any substantial or perceptible degree, yet it is apparent that, so far as the patronizing general public is concerned, it involves nothing more than mere chance. * * "

There are two characteristics of the machine in question which make it considerably different from the usual type of pinball machine. One is that before starting the play by shooting the ball, the player may insert several coins in order to increase the odds in his favor should he win. The other, that there is only one ball to be shot. When it is shot, and finally comes to rest on the playing board, the game is ended and obviously with only one ball to be shot, the game is of extremely short duration.

You do not state in your opinion request what the player of the machine in question realizes or receives should he win the game. However, considering the manner in which the machine is operated or played and the duration of the play, it is incredible that one would play it for amusement only or even on the anticipation of receiving free games. Why would a player hazard one coin or several coins in playing the machine with the view of only winning free games, each game being consummated with the shooting of one ball?

In light of the particular characteristics of the machine and the manner in which it is played, we believe it is more logical to presume that a player may expect or anticipate a return of more material things of value, such as money or other tangible property should the element of chance be in his favor and permit him to win.

If the return that a successful player receives is in fact free games, we do not endeavor at this time to express an opinion on the gambling characteristics of the machine in view of the fact that a case is now pending in one of our appellate courts involving this question. However, if the expected return to the winning player is money or other tangible property, we believe the machine would clearly fall within the ambit of Section 4678, supra, as a device used for the purpose of gaming.

In view of the characteristics of the machine and its method of operation, we believe that it should be looked upon with great suspicion for its patent potentiality seems to be one for gambling rather than amusement.

Now let us look to some of the decisions of the appellate courts of this state regarding what constitutes a gambling device. In the case of State ex rel. Igoe vs. Joynt, 110 S.W. (2d) 737, 341 Mo. 788, an injunction was sought against the St. Louis Board of Police Commissioners and the Police

Department to restrain them from seizing certain devices in the plaintiff's store called "rotary merchandisers." The plaintiff alleged they were amusement devices and not gambling devices. The machine was a cabinet-like device on the top of which was a rotary disk displaying articles of merchandise. When the disk was properly operated by the player, it could be stopped so that a particular item of merchandise might be released through a chute. In ruling that the machine was a gambling device, the court, at l.c. 740, said:

" * * * The chief element of gambling is the chance of winning or losing. * * * * It is clearly apparent that the dominating element of this device is that of chance, and therefore it is a gambling device. * * "

In State vs. Turlington, 204 S.W. 821, 200 Mo. App. 192, the defendant was charged under Section 4753, R. S. Mo. 1909 (Section 4678, R. S. Mo. 1939) with permitting punch boards as a gambling device to be used in his place of business. The prizes were post cards and knives and the punches were five cents. Later, to remove the taint of a gamble to the game, the three-cent post card was first sold for five cents which then entitled the purchaser to a punch on the board, and if the right number was punched, he got a knife. Under this arrangement the defendant contended that the punch board was not a gambling device under the statute. In ruling to the contrary, the court, at S.W. 1.c. 823, said:

"Clearly we think such board falls within the class of gambling devices. The incentive prompting any one to take a punch was the chance of getting something of more value than the cost of the chance. The amount of the winner's gain or loser's loss would make no difference, if the chance to win more than was invested was present. It is this chance to get something of more value than the amount invested that characterizes the device as a gambling one. Had the post card which was always drawn, except when a prize of more value was drawn, been in fact of the value of five cents, so that there would have been no chance for the customer or patron to lose, this would not purge the enterprise of its chance characteristics, because the chance to win more than invested yet remained. This is clearly the law as written in Moberly v. Deskin, 169 Mo. App. 672, 155 S.W. 842, from which we quote:

"The chief element of gambling is the chance or uncertainty of the hazard. It is not essential that one of the party to the wager stands to lose. The chance taken by the player may be in winning at all on the throw, or in the amount to be won or lost, and the transaction should be denounced as gaming whenever the player hazards his money on the chance that he may receive in return money or property of greater value than that he hazards. If he is offered the uncertain chance of getting something for nothing, the offer is a wager, since the operator offers to bet that the player will lose and in accepting the chance the player bets that he will win. Such offer, therefore, is a direct appeal to the gambling instinct, which, it is said, possesses every man in some degree, and it is the temptation to gratify the instinct that all penal laws aimed at gambling are designed to suppress. !"

Certainly a person maintaining on premises under his control a type of pinball machine as the one in question and permitting its use for gambling purposes would be subject to prosecution under Section 4678, supra. If in playing the Horse Race Game the player, by hazarding a coin, is afforded a chance to get something of more value than the amount invested, then such is gambling and the game is a device characterized as a gambling one. So it was held in the Turlington case and such would be the case even though the thing of value received was not paid directly from the machine, but rather by some person on the premises where the machine was operated. State vs. Pollnow, 14 S.W. (2d) 574, (Sup.).

CONCLUSION

In the premises, it is the opinion of the department that a one-ball pinball machine, commonly known as the Horse Race Game, is a device or game, the operation of which with successful or winning results is dependent upon chance. If in playing

the game the player has the chance to receive something of more value than the amount invested to play it, the game is one characterized as a gambling device used for gaming under Section 4678, R. S. Mo. 1939.

Respectfully submitted,

RICHARD F. THOMPSON Assistant Attorney General

APPROVED:

J. E. TAYLOR Attorney General

RFT:VLM

APPROPRIATIONS: State not obligated to reimburse City of Mount Vernon on sewage disposal plant.

November 10, 1949

Honorable Merideth Garten Representative, Lawrence County State Legislature Pierce City, Missouri



Dear Sir:

We have received your request for an opinion of this Department, which request is as follows:

"Can you please give me advice as to whether the state can legally reimburse the city in accordance with the enclosed letter."

The letter enclosed reads as follows:

"As you no doubt know, the City of Mt. Vernon and the Department of Public Health and Welfare, did, on November, 30, 1948, enter into a contract agreement to construct a sewage disposal plant for the joint use of the City of Mt. Vernon, Missouri and the Missouri State Sanitorium. Subsequent to this agreement the City and the Health Department entered into contract with Don P. Pray, Inc., of Monett to construct the disposal plant at the approximate cost of \$130.00.00., the State Legislature having appropriated \$65000.00 for the State's portion of the Cost of construction. Due to unforeseen and unexpected expense occasioned by changes in construction recommended by the State's Engineers the cost of construction has exceeded the amount set forth in the contract in the sum of \$2031.94.

"In order to get the plant into immediate operation, the City of Mt. Vernon has authorized Mr. Pray to proceed with construction according to plan and subsequent change orders.

"It will be necessary therefore for the City to ask the Legislature for a deficiency appropriation to reimburse it for the monies advanced in behalf of the State in payment of the excess cost of construction."

There is also enclosed a statement of Don P. Pray, Inc., General Contractor, which contains the following:

"In accordance with the agreement with the City Council to reinstate the following items that were eliminated on Change Order #8 due to lack of money by the State:"

This statement indicates that the total increased cost is \$2,031.94, and the City of Mount Vernon wishes to obtain an appropriation from the state for one-half of that amount.

The Sixty-fourth General Assembly appropriated the sum of \$65,000.00, for the state's one-half share of the cost of construction of a sewage disposal plant at Mount Vernon, Missouri. (Laws of Missouri, 1947, Volume II, page 124.)

Subsequently, the State of Missouri, through the Division of Health of the Department of Public Health and Welfare, entered into a contract with the City of Mount Vernon to provide for the joint construction of the sewage disposal plant. Paragraph 3 of that contract reads as follows:

"In the event the total cost of construction of said sewage disposal plant is in excess of One Hundred Thirty Thousand Dollars (\$130,000), the City agrees to pay said excess amount without contribution from the Division."

(Underscoring ours.)

Thus, the city expressly undertook to pay any costs of the plant in excess of \$130,000.00, and the state's obligation, according to the contract with the city agreed to, was to be only \$65,000.00. In view of this provision of the contract, the state certainly is under no legal obligation to reimburse the city for an excess expenditure.

However, should the General Assembly see fit to reimburse the city, there would appear to be no limitation on their power which would prevent their doing so.

CONCLUSION.

Therefore, it is the opinion of this Department that the State of Missouri is under no legal obligation to reimburse the City of Mount Vernon for costs of a sewage disposal plant, which costs the city agreed to pay in excess of a specified amount, although there is no constitutional provision which prevents reimbursement by the General Assembly.

Respectfully submitted,

ROBERT R. WELBORN Assistant Attorney General

APPROVED:

J. E. TAYLOR Attorney General TAXATION:

Any property owned by a city is exempt from taxation under the authority of the Constitution and under Section 10.942.4 Mo. R.S.A.

January 7, 1949

Mr. R. M. Gifford Prosecuting Attorney Milan, Missouri

Dear Sir:



This will acknowledge receipt of your letter of December, 1948, in which you request an opinion of this department. Said letter, omitting caption and signature, is as follows:

"The City of Greene City, Sullivan County, Missouri, a city of the fourth class, has title to a business building in that city on which they have executed a lease for a term of fifty years to the King-Walker-Custer Post No. 365 to be used as a meeting place for its members. This lease includes both stories of the building and recites a payment for rental of One Dollar per year.

Now the Legion has entered into an agreement whereby they have leased a part of the second floor to individuals for living purposes and office space in one instance. They, of course, are receiving compensation for this space but none of it, except the recited one dollar, goes to the use of the City.

The question arises whether under such agreement and arrangement such building can be assessed for tax purposes.

Your opinion will be appreciated."

From the facts stated above it appears that we have a situation where municipally owned property, which is not being used for municipal purposes, is leased to a patriotic but non-charitable organization.

All property owned by a city is, under Section 6 of Article 10 of the Constitution of Missouri, exempted from taxation. Said provision is as follows:

Mr. R. M. Gifford

"Section 6. All property, real and personal of the state, counties and other political subdivisions, and non-profit cemeteries, shall be exempt from taxation; and all property, real and personal, not held for private or corporate profit and used exclusively for religious worship, for schools and colleges, for purposes purely charitable, or for agricultural and horticultural societies may be exempted from taxation by general law. All laws exempting from taxation property other than the property enumerated in this article, shall be void."

It will be noted that "cities" or "municipal corporations" are not specifically named in the above constitutional provision; however, the courts have held that cities and municipal corporations are political subdivisions of the state, which are specifically mentioned in the aforesaid provision. In the case of State ex rel Spencer vs Anderson, 101 S.W. (2) 530, the St. Louis Court of Appeals made the following statement:

"A municipal corporation, on the other hand, is but a creature or political subdivision of the state, possessing only such powers as are conferred upon it by express or implied provisions of law, and with any reasonable doubt as to whether it has a given power resolved against it. State ex rel City of Blue Springs vs McWilliams, 335 Mo. 816, 74 S.W. (2) 363; State ex rel City of Hannibal vs Smith, 335 Mo. 825, 74 S.W. (2) 367; Taylor vs Dimmitt, 336 Mo. 330, 78 S.W. (2) 841, 98 A.L.R. 995."

Pursuant to the above authority, the Legislature, in 1945, passed a statute which is known as Section 10942.4 Mo. R.S.A. exempting city owned property from taxation, which statute provides as follows:

"The following subjects shall be exempt from taxation for state, county or local purposes: First, lands and other property belonging to this state; Second, lands and other property belonging to any city, county or other political subdivision in this state, including market houses, town halls and other public structures, with their furniture and equiments and on public squares and lots kept open for health use or ornaments; Third, land or lots of ground granted by the United States or this state to any county, city or town, village or township, for the purpose of education, until disposed of to individuals by sale or lease; Fourth, non-profit cemeteries; Fifth, the real estate and

tangible personal property which is used exclusively for agricultural or horticultural societies heretofore organized, or which may be hereafter organized in this state; Sixth, all property, real and personal actually and regularly used exclusively for religious worship, for schools and colleges, or for purposes purely charitable, and not held for private or corporate profit shall be exempted from taxation for state, city, county, school, and local purposes; provided, however, that the exemption herein granted shall not include real property not actually used or occupied for the purpose of the organization but held or used as investment even though the income or rentals received therefrom be used wholly for religious, educational, or charitable purposes."

It will be noted that the constitutional provision set out supra authorized legislation exempting the property belonging to cities without any reservation as to the income derived therefrom, if any, or without any other consideration. The statute cites also exempted property owned by a city, the only proviso being, that in the case of an organization the property should be used for organization purposes and not for investment purposes. However, in the instant case, even if the proviso relative to investments referred to the cities, it certainly could not be said that if Green City was holding this property for investment purposes that it would lease the property for the sum of One Dollar for fifty years.

The courts of this state have held that exemptions from taxation must be strictly but reasonably construed. See Missouri Goodwill Industries vs Gruner, 210 S.W. (2) 38, (Mo. Sup).; Salvation Army vs. Hoehn, 188 S.W. (2) 826, 354 Mo. 107. However, this rule applies to the question of whether a particular organization is of a charitable nature. We are not asked to determine whether an organization is or is not of a charitable nature since the exemption to be considered in our case refers to city owned property and such property is specifically exempted by statute under the authority of the Constitution of Missouri. Under such circumstances, this department feels that a strict construction of the constitutional provision and statutes pertaining thereto will render this property non-taxable.

In view of the facts, either the city or the lessee may be taking advantage of the law but such fact can not alter it. Certainly, if the property was owned by the Legion and any part of it was rented and income derived therefrom, regardless of the organization's patriotic or charitable nature, such property would be taxable. See Fitterer vs Crawford, 57 S.W. 532, 157 Mo. 51. However the property in question is owned by a municipal corporation and is, as such, we feel, non taxable and remains so under all

Mr. R. M. Gifford

conditions. In the case of State ex rel Orr vs Buder, Assessor, et al, the Supreme Court stated as follows:

"Non-taxable property is non-taxable under all conditions."

It appears to this department that this is non-taxable property and will remain such in spite of the circumstances set out in your request.

CONCLUSION

Therefore, it is the opinion of this department that the municipally owned building, even though leased to a non-charitable, patriotic organization which is deriving income from the rent thereon, is non-taxable under the provisions of the Constitution of Missouri and the Statutes pertaining thereto.

Respectfully submitted,

-4-

APPROVED:

J.E. TAYLOR

Attorney General

JOHN S. PHILLIPS

Assistant Attorney General

SALE OF COUNTY PROPERTY: A county court has the power and authority to convey real estate belonging to the county. Such conveyance can be made by the court itself without the appointment of a commissioner.

February 18, 1949

Honorable J. R. Gideon Prosecuting Attorney Forsythe, Missouri

Dear Sir:

This office is in receipt of your recent letter requesting an official opinion upon two matters, the first of which is:

(1). What is the proper method by which a county can convey real property belonging to it?

The second of which is:

(2). Would a deed executed by the county court be sufficient to pass good title, or will a commissioner have to be appointed to make the deed under the order of the court?

In answer to your first inquiry we would call your attention to Section 2480, R. S. Mo. 1939, which states:

> "The said court shall have control and management of the property, real and personal, belonging to the county, and shall have power and authority to purchase, lease or receive by donation any property, real or personal, for the use and benefit of the county; to sell and cause to be conveyed any real estate, goods or chattels belonging to the county, appropriating the proceeds of such sale to the use of the same. and to audit and settle all demands against the county."

We would also call your attention to the case of Aslin v. Stoddard County, 341 Mo. 138, which states:

> "The county court, as we have said, is a continuous body. It represents and acts for the county. In making contracts it may be said to be the county."



We would call your further attention to the case of Butler County v. Campbell, 353 Mo. 413, l.c. 419, which states:

"* * Under the laws of this state, the county court is vested with full power and authority to control and manage the real and personal property of the county and, 'for the use and benefit of the county; to sell and cause to be conveyed any real estate, goods or chattels belonging to the county.' Sec. 2480, R. S. 1939. In directing how this power and authority shall be exercised, the statutes provide that the county court may, by order, appoint a commissioner to sell and dispose of any real estate belonging to their county.' Sec. 13784, R. S. 1939. It is apparent that 'county courts are by law constituted the guardians of the property and interest of their respective counties. "They occupy a position of trust in that respect, and "in that relation are bound to the same measures of good faith toward the counties which is required of an ordinary trustee toward his cestui (592) que trust, or an agent toward his principal." State ex rel. Garland County v. Baxter (Ark. Sup.), 8 S.W. 188; Willard V. Comstock (wis. Sup.), 17 N.W. 401, 406. 'County courts are * * * the agents of the county, with no powers except what are granted, defined and limited by law, and, like all other agents, they must pursue their authority, and act within the scope of their powers.' State ex rel. Quincy, Mo. & Pac. R. Co. v. Harris, 96 Mo. 29, 37, 8 S. W. 794. * * *"

We would call your further attention to the case of Elliot v. Buffington, 149 Mo. 663, which holds in substance that a sale by a county court of lands belonging to the county is a sale by the county.

In view of the above it is the opinion of this office that the only body within a county which is authorized to convey county property is the county court, and that a county court is so authorized.

In reply to your second inquiry, to wit:

"Would a deed executed by the county court be sufficient to pass good title, or will a commissioner have to be appointed to make the deed under the order of the court?"

We would call your attention to Section 13784, R. S. Mo. 1939, which states:

"The county court may by order, appoint a commissioner to sell and dispose of any real estate belonging to their county; and the deed of such commissioner, under his proper hand and seal, for and in behalf of such county, duly acknowledged and recorded, shall be sufficient to convey to the purchaser all the right, title, interest and estate which the county may then have in or to the premises so conveyed."

It is the opinion of this office that Section 13784, supra, is permissive and not directive, that is, that for purposes of convenience or expediency a county court may appoint a commissioner to sell and dispose of any real estate belonging to the county, but that it is not obliged to do so. In support of this position we would call your attention again to the case of Elliot v. Buffington, 149 Mo. 663, which holds that a county court may dispose of real property belonging to the county by appointing a commissioner to sell the county land and make a deed to it in his capacity as a commissioner, or that the county court may dispense with a commissioner and make the deed itself. There is a line of Missouri decisions subsequent to the Elliot case which sustains this position, and it is, of course, only reasonable that such should be the case. A county court -- or any other principal -- cannot convey to a commissioner -- or any other agent -- more power than it possesses itself, and therefore, any act which could be done by a commissioner appointed by the county court could be done by the court itself.

CONCLUSION

It is the opinion of this office that a county court has the power and authority to convey real estate belonging to the county. It is the further opinion of this office that such conveyance can be made by the court itself without the appointment of a commissioner.

Respectfully submitted,

APPROVED:

HUGH P. WILLIAMSON Assistant Attorney General

J. E. TAYLOR Attorney General

HPW: mw

TAXATION:

REVENUE:

Irrevocable trust created December 30, 1909, subject to provisions of the Collateral Inheritance Tax Law found Laws of 1899, page 328, R. S. Mo. 1909, Section

309.

March 9, 1949

33

Mr. C. L. Gillilan Assistant Supervisor Inheritance Tax Unit Department of Revenue Jefferson City, Missouri

Dear Sir:

Reference is made to your request for an official opinion of this department reading as follows:

"I am enclosing copies of correspondence relative to an irrevocable trust created in 1909 in which the grantor retained the income from the corpus during her lifetime.

"The question presented is whether or not a claim of exemption from Inheritance Tax can be maintained because of the fact that the trust was created prior to the enactment of our present Inheritance Tax laws."

From further correspondence attached to your letter of inquiry, we note that the trustor died on June 4, 1946, being at that time a resident of the State of Missouri.

At the time this trust referred to in your letter of inquiry was created, there was in existence Section 309, R. S. Mo. 1909, imposing a collateral inheritance tax and reading in part as follows:

"All property * * * * * * * or any interest therein or income therefrom, which shall be transferred by deed, grant, bargain, sale or gift, made or intended to take effect in possession or enjoyment after the death of the grantor, bargainor, vendor or donor, to any person or persons, or to any body politic or corporate, either directly or in trust or otherwise, or by reason whereof any person or body politic or corporate shall become beneficially entitled in possession or expectancy, to any property or the income thereof, other than to or for the use of the father, mother, husband, wife, legally adopted children, or direct lineal descendant of the testator, intestate, grantor, bargainor, vendor or donor, except property conveyed for some educational, charitable or religious purpose exclusively, shall be and is subject to the payment of a collateral inheritance tax of five dollars for each and every one hundred dollars of the clear market value of such property, * * "

This statute was originally enacted together with others relating to the same subject matter in an act found Laws of 1899, page 328. Its validity, with respect to numerous constitutional objections, had been sustained in State ex rel. vs. Henderson, 160 Mo. 190. It is apparent that the transfer of the corpus of the trust estate to the trustee was subject to liability for the tax imposed by the quoted statute. However, under the further provisions of Section 314, R. S. Mo. 1909, the time for the payment of such tax was delayed until the persons having the beneficial interest therein actually came into possession of the corpus of the trust estate. Section 314 reads in part as follows:

"When any grant, gift, legacy or inheritance upon which a tax is imposed by section 309 of this article, shall be a remainder, reversion or other expectancy, real or personal, the tax on such estate shallnot be payable, nor interest begin to run thereon, until the person or persons liable for the same shall come into actual possession of such estate, by the termination of the estate for life or years, and the tax shall be assessed upon the value of the estate at the time the right of possession accrues to the owner as aforesaid: # # # # # #

Although we have not been favored with a copy of the trust instrument itself, yet we gather from your letter of inquiry and the correspondence attached thereto that the trust terminated upon the date of the death of the trustor, viz.:

June 4, 1946, and that at that time the beneficiaries of the trust became entitled to the possession of the corpus thereof.

It might be urged that in view of the subsequent repeal of the Collateral Inheritance Tax Act under which liability was imposed upon the transfer in trust, such tax has thereby been abated. In this regard your attention is directed to Section 33 of an act found Laws of 1917, page 115, repealing the Collateral Inheritance Tax Act. The section mentioned contained a savings clause with respect to taxes which were then due or which might become due thereafter, and read as follows:

"That article 14 of chapter 2 of the Revised Statutes of the state of Missouri of 1909, entitled 'Collateral inheritance tax' and all amendments thereto and all acts and parts of acts in conflict with this act are hereby expressly repealed; provided, however, that such repeal shall in nowise affect any suit, prosecution or court proceeding pending at the time this act shall take effect, or any right which the state of Missouri may have at the time of the taking effect of this act, to claim a tax or lien upon any property under the provisions of the act or acts hereby repealed, for which no proceeding has been commenced; nor affect any appeal, right of appeal in any suit pending or orders fixing tax, existing in this state at the time of the taking effect of this act."

CONCLUSION

In the premises, we are of the opinion that a transfer in trust of the type and nature mentioned in your letter of inquiry made under date of December 30, 1909, was subject to the tax imposed under Section 309, R. S. Mo. 1909.

We are further of the opinion that such tax became due and payable upon the beneficiaries of such trust coming into the actual possession of the corpus of the trust estate.

Respectfully submitted,

WILL F. BERRY, JR. Assistant Attorney General

APPROVED:

J. E. TAYLOR Attorney General

WFB:VLM

WORKMEN'S COMPENSATION: Every employer must pay \$100 into the

SECOND INJURY FUND.

: Second Injury Fund in every case of total, : permanent loss by his employee of the use

: of each of the human eyes, totaling :\$200 for the total, permanent loss of : the use of both eyes, even though the

: loss occurs in the same accident.

March 12, 1949

Honorable Spencer H. Givens Director Division of Workmen's Compensation Jefferson City, Missouri



Dear Director Givens:

This will acknowledge your letter requesting an opinion from this department respecting the construction of the provision in Section 3707, Chapter 29, Laws of Missouri, 1945, page 1998, requiring the payment of \$100 by an employer to the Second Injury Fund in case an employee of such employer suffers the total, permanent loss of one eye. Your letter is as follows:

"We are seeking an opinion from your department as a guide to follow in a circumstance described below:

"The Second Injury Fund (Section 3707 R.S. Mo. 1939) is created by the payment into the Fund of specified amounts in cases of certain injuries and in cases of death where there are no dependents as defined by the law. For injury payments into the Fund the section above cited specifies as follows:

"'Every employer in every case of total, permanent loss of the use of, one eye, one foot, one leg, one arm, or one hand, in addition to the compensation as provided for in this act shall pay into the Second Injury Fund provided for herein, the sum of one hundred dollars for the total or permanent loss of the use of any such member; . . .

"This language is explicit as to 'one eye, one foot,' etc., which fact has led us to believe that in the simultaneous loss

of two such members the payment required still would be \$100 and not \$200. We have felt that if payment of \$200 were required in such an instance, the language of the statute would have been 'each eye, each foot,' etc.

"Our question is, therefore, in those cases of simultaneous loss of two members mentioned in Section 3707 should we ask employer and/or insurer for the payment into the Fund of \$100 or \$200."

Your request for this opinion is directed to whether, in case such employee suffers the total, permanent use of both eyes in the same accident, the employer shall pay into the Second Injury Fund \$100 for the loss of the use of both eyes as a unit, or whether in the alternative, such employer shall pay \$200, that is to say, \$100 for the loss of the use of each eye under such circumstances, treating each eye in the singular rather than with the other eye as a unit.

The specific sentence in said Section 3707, Chapter 29, Laws of Missouri, 1945, page 1998, on this question is as follows:

"* * Every employer in every case of total, permanent loss of the use of, one eye, one foot, one leg, one arm, or one hand, in addition to the compensation as provided for in this act shall pay into the Second Injury Fund provided for herein, the sum of one hundred dollars for the total or permanent loss of the use of any such member; * * * ."

The language used in the sentence is definite in describing the loss of an eye in the singular. It states: "one eye". A part of the sentence is the provision that every employer in case of total, permanent loss of the use of one eye, in addition to regular compensation provided for in said chapter, shall pay into the Second Injury Fund provided in said Section 3707, the sum of \$100 for the total or permanent loss of the use of any such member (underscoring ours.) There is no language used in said Section 3707, as so amended, which may be construed, we believe, as indicating the intent of the Legislature, in

using the singular, "one eye", to mean that the loss of the use of both eyes in the same accident could be construed or determined to include both eyes for the loss of the use of which the payment into the Second Injury Fund would be fixed at \$100.

Section 3705, in defining the compensation for various injuries to the several members of the human body in specifications 43 and 44, treat the eyes as single members, and compute the payment of the complete loss of one eye at a certain sum, and the complete loss of the sight of an eye at another sum. The Second Injury Fund statute, Section 3707, is itself a compensation statute and so declared by the terms of the section itself. Here, however, we are not dealing with the question of payments out of the Second Injury Fund as compensation, but rather with payments as contributions to the Second Injury Fund for the loss of the use of members named in the sentence taken from said Section 3707, and hereinabove quoted. We cannot overlook the last phrase of the sentence of the said section we are now considering, and which we have hereinabove underscored. The Legislature, in the language used in considering the human eye as the subject matter and the context of the sentence as fixing the payment for the loss of one eye, and further saying that such payment was for the loss of the use of "any such member", intended to fix the loss for each eye distinct and separate from the other eye and in the singular, we believe.

The Second Injury Fund as a part of our Workmen's Compensation Act is of such recent enactment its terms have not been construed by the higher courts of our State nor the courts of other States where such statutes are in force. We have read like sections to what we call our Second Injury section in the statutes of numerous other States. But after diligent search we have failed to find a decision from any of the courts of other States where such statutes are in operation.

The Supreme Court of the State of Tennessee in a Workmen's Compensation case considered the question whether the organs of sight were to be considered as singular, separately, or as a unit. That case was one of construction of a statute of Tennessee on regular or ordinary compensation, and was not concerned in anywise with a Second Injury statute. The case is Catlett vs. Chattanooga Handle Co., reported in 55 S.W. (2d) 257. In that case the employee had suffered the loss of vision of one eye by affliction during his infancy. The loss of the other and remaining eye was suffered in later life while he was employed, and subject to the Workmen's Compensation Act of the State of Tennessee. The question was whether he had suffered a total, permanent disability by the loss of the vision of the remaining eye by accident and if the two losses were to be considered together, so as to come within the terms of the statute of that State defining compensation for total, permanent disability as the result of the loss of both eyes. The court held that the loss by the employee of the one eye in infancy by affliction did not constitute an element of total, permanent disability when the loss of the remaining eye was sustained as an employee subject to the Compensation laws of that State so as to merit compensation for total, permanent disability. The Supreme Court of Tennessee in that case, in quoting one of its former decisions, on a similar question, held that the two organs of sight of the human body are not to be taken as a unit. Each stands, the court said, singly and by itself as the subject of compensation, if and when a loss of the member occurs. The Court in so holding, 1.c. 258, said:

> "In prescribing compensation for injury to vision the Legislature did not consider the organs of sight as a unit, as of the organs of hearing. See Diamond Coal Co. v. Jackson, 156 Tenn. 182, 299 S.W. 802. Each eye was considered separately, and compensation related to a specific loss; the loss of one constituting permanent partial disability and the loss of both total permanent disability.

The last sentence in the fourth paragraph of your letter states:

> "We have felt that if payment of \$200 were required in such an instance, the language of the statute would have been 'each eye, each foot,' etc.'

We believe the language used by the Legislature in the enactment of this statute, and this particular

sentence in Section 3707, means that by using the word "one" in describing the human eye it was intended that it should be used interchangeable with "an" eye, "each" eye, "any" eye, or whatever word might bear a relationship to the subject matter and the preceding context of the sentence, and that the Legislature meant to designate each single eye as meriting the payment of \$100 if the permanent loss of the use of "each" eye should occur to an employee. We shall endeavor to cite authorities, both text and judicial, to sustain this view by the following:

Section 655, R.S. Mo. 1939, Article 2, Chapter 4, under the subject of construction of statutes, states in the first subdivision of the rules of construction, the following:

> "* * *First, words and phrases shall be taken in their plain or ordinary and usual sense, * * * ."

There are numerous decisions by our Supreme Court affirmatively upholding this statutory rule. The text of 59 C.J., Section 577, pages 974 and 975, states the same rule, citing many Missouri decisions under note 20.

The word "one" as used to name the human eye denotes a noun. 46 C.J., page 1103, states this text in defining the word "one" as a noun:

"A single person or thing."

The words "an" or "any" are defined in 2 C.J., page 1332, as interchangeable with the word "one". That text states:

> "An. Any; in its most absolute sense, any whatsoever; the. The word originally meant 'one' and is seldom used to denote plurality."

Volume 3, C.J.S., page 1399, gives the further definitive text on the meaning of the word "any", as follows:

"It has been said that 'any' is derived from the Anglo-Saxon 'Aenig' meaning 'one'; and that in the singular the primary meaning of the word is one definitely, or indifferently, out of a number, although it has been said that strictly the word is applicable only to one of three or more. * * * .

Volume 3, C.J., pages 231, 232 and 233, states that the word "any" often has the meaning of "each", "each one of all".

In Volume 3, C.J. pages 232, 244, the text states the word "any" is frequently used in its singular sense in numerous phrases, for instance, on page 244 of said work the phrase "any such" is given as the subject of such ususage, and cites under footnote 91 cases construing the meaning of the phrase "any such", some of which we will cite and quote, in part, here. This, we think, will aid in an understanding of the meaning of that part of said Section 3707 where the words previously underscored herein, "any such member" appear, and in determining the meaning of "one eye", as used in said section, to be the same as if it had said "each eye".

The construction of a statute of this State was before our Supreme Court in the case of State ex rel. Power Co. vs. Public Service Commission of Missouri, 84 S.W. (2d) 905. The case involved the definition and construction of the word "any" as used in Missouri Statutes Annotated, Section 5141, now our Section 5597. The statute being construed dealt with the payment of fees for the issuance of bonds or other evidence of indebtedness, taking into consideration the amount of the issue, and had a proviso that fees should not be charged when such issue was made for the purpose of guaranteeing, taking over, refunding, discharging or retiring "any" bond, etc. up to the amount of the issue guaranteed, taken over, refunded, discharged or retired. An attempt was made to collect fees in instances prohibited by the proviso on the ground that the word "any" included all bonds mentioned in said section regardless of the terms of the proviso. The Supreme Court of this State held such fees could not be lawfully collected. In the determination of the case, and in construing said section and defining the word "any' the Court, 1.c. 908, said:

"The statute (Mo. St. Ann. Sec. 5141, p. 6548) is plain and unambiguous. It says that 'No fee shall be charged when such (bond) issue is for the purpose of * * * refunding * * * any bond, note or other evidence of indebtedness up to the amount of the issue * * * refunded, discharged or retired.' (Italics ours.) The word 'any' is so well understood as hardly to require definition. In Shaw v. Lone Star Building & Loan Association, 40 S.W. (2d) 968, the Texas Court of Civil Appeals had under consideration a statute providing how and in what court 'any action' thereunder should be brought. The court said, 40 S.W. (2d) 968, loc. cit. 969 (1,2): 'The word "any" is defined and is used in this statute to mean "every" or "all," or "no matter what one." Webster's New International Dictionary. "Any" is also used as a term synonymous with "either" and is given the full force of "every" or "all." Bouvier Law Dictionary (Rawles 3d Rev.) P. 205; McMurray v. Brown, 91 U.S. (257) 265, 23 L. Ed. 321; People v. Fidelity & Casualty Co. of New York, 153 Ill. 25, 38 N.E. 752, 26 L.R.A. 295.'"

The construction of the definition and the interchangeable use of the word "any" with the words "other", "each" and "every" was before the Court of Appeals of New York in the case of Danziger vs. Simonson, 22 N.E. 570. The case was one where the Court was construing the word "any" with reference to the assertion of a lien as to whether the right was restricted to particular liens or whether the right was extended to the assertion of all liens. The Court in its discussion of the point, and in holding that the right extended to any and all liens, l.c. 571, said:

"* * * Where a claimant is made a party defendant to any action brought to enforce any other lien, a notice of pendency, etc., must be filed. The word 'other' is preceded by the word 'any'; and, under the rule of Flanagan v. Hollingsworth, we must

give each word its appropriate meaning. The word 'any' is used in various ways, and may convey different meanings. It may mean one or many, each or every. In some instances it means an indefinite number. The connection in which it is used in the statute under consideration appears to us to indicate each and every, and is the same as if the statute read, 'any action brought to enforce each and every other lien.' It consequently appears to us that the statute is broad enough to include a mortgage lien, and is not confined to mechanics' liens."

The phrase "any such member" as it appears in the sentence hereinabove quoted from said Section 3707, refers to the preceding words of "one eye, one foot, one leg, one arm or one hand." A like phrase, "any such case", was construed as to its meaning by the Supreme Court of Pennsylvania in the case of Commonwealth vs. Burrell, 7 Pennsylvania State Reports 34. On the point, the Court, 1.c. 37, held:

> "Now what are we to understand by the words 'any such case?' Upon every principle of grammatical relation and obvious meaning, we must intend that the legislature had in view the cases specified in the same section immediately preceding the final clause. It was of these it had been speaking, and it was of these it was continuing to speak.

The word "any" is used interchangeably with, and may have the same meaning as "either", or "any such". It was so held by the District Court of Appeals of Division No. 2, Los Angeles, California, and a review thereof was denied by the Supreme Court of the State of California in the case of Powell vs. Allan et al., reported in 234 Pac. 339. The Court in so holding, 1.c. 345, said:

> "It has been held that 'any' should be construed as synonymous with 'either' whenever it is necessary to do so in order to prevent destroying the evident

intention of the Legislature. Fenet v. McCuiston, 105 Tex. 299, 303, 147 S.W. 867; Dowling v. State, 5 Smedes & M. (Miss.) 664; State v. Antonio, 2 Tread, Const. (S.C.) 776, 783; 3 C.J., p. 231; Words and Phrases, vol. 1, p. 414; note to State v. Kansas City, supra, Ann. Cas. 1916E, p. 11.

"We think that the word 'any', as used in the phrase 'in any event' in section 32 of this act, should be construed as synonymous with the word 'either' or as the equivalent of the term 'any such,' and that when the Legislature said that 'in any event' shall be competent for the city to advance money to the special fund in exchange for bonds, it had in mind that if it became necessary for the city to advance money to that fund for the purpose of paying incidental expenses or awards of damages, or both, then and in either of those events, or in any such event, it would be competent for the city to make the advances and to receive bonds in exchange. * * *."

It would thus appear that by the provision in said Section 3707, as amended, Laws of Missouri, 1945, page 1998, it was the intent of the Legislature in its enactment, where it provides "Every employer in every case of total, permanent loss of the use of, one eye, one foot, one leg, one arm, or one hand, in addition to the compensation as provided for in this act shall pay into the Second Injury Fund provided for herein, the sum of one hundred dollars for the total or permanent loss of the use of any such member; "that it means the same as if the section read "each eye", "each foot", "each leg", "each arm", or "each hand".

CONCLUSION.

It is, therefore, the opinion of this department that in Section 3707, Chapter 29, as amended, Laws of Missouri,

1945, page 1998, where it is provided that: "* * * Every employer in every case of total, permanent loss of the use of, one eye, one foot, one leg, one arm, or one hand, in addition to the compensation as provided for in this act shall pay into the Second Injury Fund provided for herein, the sum of one hundred dollars for the total or permanent loss of the use of any such member; * * * " the Legislature intended said Section to mean, and said section does mean, that the sum of one hundred (\$100.00) dollars shall be paid for the total, permanent loss of the use of each separate, single eye, even though the total, permanent loss of the use of both eyes may occur in the same accident. The section does not mean, as we view it, that under any circumstances shall the employer pay only the sum of one hundred (\$100.00) dollars for the loss of the total, permanent use of both of the human eyes. It does mean that in case of the loss of both of the human eyes, one at a time, or both at the same time, the total payment shall be for the total, permanent loss of the use thereof of two hundred (\$200.00) dollars.

Respectfully submitted,

GEORGE W. CROWLEY Assistant Attorney General

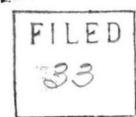
APPROVED:

J. E. TAYLOR Attorney General SCHOOLS: Election for annexation of school district void where notice posted for fourteen days instead of fifteen days required by statute.

August 16, 1949

8/3/49

Hon. James Glenn Prosecuting Attorney Macon County Macon, Missouri



Dear Sir:

We have received your request for an opinion of this department, which request is as follows:

"Your opinion is requested as to the proper action to be taken by the County Clerk of Macon County, Missouri, in assessing the amount and extending tax on the general tax books. The problem concerns school tax money only and of necessity a rather full statement of the facts is necessary.

"As a result of proper petition filed with the board of school district C. D. #2 the board of directors of the district on May 30, 1949, ordered a special election for June 14, 1949. In accordance with the order the clerk posted notices but there is no doubt but that the notices were not posted earlier than May 31, 1949, which would be insufficient notice. The proposition to be voted on was 'to annex school district No. C. D. #2 to the Ethel Special School District No. 39.' The election was held on June 14, 1949, and the proposition carried by a vote of 45 for annexation and 17 against.

"On June 15, 1949, the clerk of district C. D. #2 advised the Ethel School District by letter of the results of the election. On the 20th day of June, 1949, the Board of Directors of the Ethel School District

voted to accept school district C. D. #2 into the Ethel School District.

"Prior to June 23, 1949, a taxpayer of school district C. D. #2 filed a written protest against the election for annexation with the board of directors of district C. D. #2. I have no definite information as to whether a written protest was filed with the board of the Ethel School District. No court action has been instituted to date by any parties concerned.

"On June 23, 1949, the board of directors of School District C. D. #2 met and considered the protest filed and by a vote of 4 to 2 held the election illegal and void and of no effect because of insufficient notice.

"All papers in connection with the above have been filed with the Clerk of Macon County and a plat of the Ethel School District showing school district C. D. #2 to be a part of Ethel Special School District #39. However, in applying for state aid and in estimates filed with the County Clerk, Ethel Special School District #39 did not include school district C. D. #2 nor the assessed valuation of school district C. D. #2 has filed for state aid and an estimate has been filed with the County Clerk showing the assessed valuation in the district.

"The County Superintendent of Education has approved the application for state aid of the Ethel School District but has refused to approve any of the other estimates submitted by either district.

"The school tax rate levied in C. D. #2 is \$1.00 and in Ethel Special School District #39 is \$1.50.

"On these facts what is the proper action for the County Clerk to take in assessing the amounts and extending the general tax books?" Section 10484, R. S. Mo. 1939, re-enacted Laws 1947, Volume I, page 507, provides for annexation of school districts as follows:

> "Whenever an entire school district, or a part of a district, whether in either case it be a common school district, or a city, town or consolidated school district, which adjoins any city, town, consolidated or village school district, including districts organized and existing under the provisions of Article 18 of Chapter 72, Revised Statutes of Missouri, 1939, desires to be attached thereto for school purposes, upon the reception of a petition setting forth such fact and signed by ten qualified voters of such district, the board of directors thereof shall order a special meeting or special election for said purpose by giving notice as required by section 10418; provided, however, that after the holding of any such special election, no other such special election shall be called within a period of two years thereafter. Should a majority of the votes cast favor such annexation, the secretary shall certify the fact, with a copy of the record, to the board of said district and to the board of said city, town or village school district; whereupon the board of such city, town or village district shall meet to consider the advisability of receiving such territory, and should a majority of all the members of said board favor such annexation, the boundary lines of such city or town school district shall from that date be changed so as to include said territory, and said board shall immediately notify the clerk of said district which has been annexed, in whole or in part, of its action. In case an entire district is thus annexed, all property and money on hand thereto belonging shall immediately pass into the possession of the board of said city or town school district; but should only a part of a district be annexed thereto, said part shall relinquish all claim and title to any

part of the school property and money on hand belonging to said original district, and that portion of the district remaining must contain within its limits thirty children and thirty thousand dollars assessed valuation, or thirty children and nine square miles of territory. The voting at said special school meeting or special election shall be by ballot, as provided for in section 10467, in the case of common school districts, or as provided for in section 10483 in the case of town, city or consolidated school districts, and the ballots shall be 'for annexation' and 'against annexation, when the whole district is to be annexed, but if only a part is to be annexed, the ballots shall read 'for release' and 'against release.'"

Section 10418, R. S. Mo. 1939, referred to in the preceding section, provides:

"The annual meeting of each school district shall be held on the first Tuesday in April of each year, at the district schoolhouse, commencing at 2 o'clock p.m. If no schoolhouse is located within the district, the place of meeting shall be designated by notices, posted in five public places within the district fifteen days previous to such annual meeting, or by notice for same length of time in all the newspapers published in the district, giving the time, place and purposes of such meeting."

The Supreme Court has explained the proper method of computing the fifteen day period under a statute similar to Section 10418 in the case of Butler v. Bd. of Education of Consol. Sch. Dist. No. 1, 16 S.W. (2d) 44, l.c. 45, as follows:

"Plaintiffs next contend the voters were not given 15 days' notice of the election as required by section 11127, R. S. 1919. It is provided in section 7058, R. S. 1919, as follows: ' * * * Fourth, the time within which an act is to be done shall be computed by excluding the first day and including the

last, if the last day be Sunday it shall be excluded. * * *'

"The notices were posted on March 8, 1928, and the election was held March 23, 1928. Excluding the first and including the last day gives 15 days' notice of the election. Stutz v. Cameron, 254 Mo. 340, loc. cit. 363, 162 S.W. 221. The contention is over-ruled."

Applying that rule in the present situation, if the notices were posted on May 31, 1949, and the election held on June 14, 1949, the period would be only fourteen days instead of the fifteen days required by the statute.

There are cases in this state which declare that failure to give notice as required by Section 10418, supra, renders void any action taken at a meeting held thereunder. State ex rel. School District of Affton v. Smith, 336 Mo. 703, 80 S.W. (2d) 858. There have, however, been no cases which have involved the exact question of whether or not failure to post notice for the time required by the section renders void action taken under such notice.

The Supreme Court, in the case of State ex rel. City of Berkeley v. Holmes, 219 S.W. (2d) 650, recently considered the question of the effect of failure to give proper notice of a special election held for the purpose of approving the issuance of municipal bonds. In that case the statute involved (Sec. 7369, R.S. Mo. 1939, amended Laws 1945, page 1301) provided that notice of a special election such as the one held should be published once a week for three consecutive weeks in a newspaper, the first publication of the notice to be made at least twenty-one days before the election. The first publication of notice of the election in question was made only nineteen days before the date of the election. The decision of the court in that case is, we feel, decisive of the question of the validity of the election here under consideration, and we quote at length from the opinion:

" * * * The rule for which relator contends is stated in the Weisgerber case (a bond election case) as follows (33 Idaho 670, 197 P. 563): 'Statutory directions as to the time and manner of giving notice of elections are mandatory upon the officers

charged with the duty of calling the election, and will be upheld strictly in a direct action instituted before an election; but after an election has been held, such statutory requirements are directory, unless it appears that the failure to give notice for the full time specified by the statute has prevented electors from giving a full and free expression of their will at the election, or unless the statute contains a further provision, the necessary effect of which is that failure to give notice for the statutory time will render the election void. The Court cited many cases from other states in support of these conclusions. However, it recognized that 'in some jurisdictions it is held that a strict compliance with the statutory requirements as to the time of giving notice of an election is an essential prerequisite to its validity.' An example of these is Pollard v. City of Norwalk, 108 Conn. 145, 142 A. 807, 808, in which the Supreme Court of Connecticut held invalid bonds authorized at an election of which only 13 days notice was given when the law required 'at least two weeks. The Court held that the provision for time of notice 'must be complied with literally' before there could be valid action, saying: 'The votes of a meeting of which notice has been given for less than the period required by the statute, though it be only for a single day, "are no more binding upon the town than if the meeting had been held without notice, or had been a mere fortuitous assembling of any portion of the inhabitants of the town."

" * * * It is, of course, partly a question of construction of the particular statutes involved in each case. It is generally held that laws requiring notice of general elections, the time of which is fixed by law, are directory only and that their principal purpose is to remind the voters of such elections, as to which it is presumed that they know the time, place and usual purposes without additional notice. However, a

special election is a different matter; and even special questions submitted at general elections are usually held to be special elections. There is much authority that there must be compliance with provisions for time of notice of special elections and that failure to give notice for the time required by the statutes authorizing a special election invalidates it. (Citations omitted.) Some cases make a distinction on the basis of substantial compliance between the situation of no notice at all and notice for part of the required period. Apparently the only direct Missouri authorities on this question are decisions of our Courts of Appeals on special local option elections. (Citations omitted.) These cases establish the rule that strict compliance with statutory provisions for time of notice is essential to the validity of such an election.

* * * * * * * *

"Our Section 7369 does say that notice of such election shall be given in a certain specified way; and our conclusion is that the time of notice specified therein is a mandatory requirement which must be complied with to have a valid special election authorizing an increase in the indebtedness of the City. The Legislature was very specific in stating these requirements as to time of notice, and used mandatory language concerning them, and we do not think we should undertake to modify them or hold that anything less is a substantial compliance with them. tions as to form of notice or of ballots, which could not mislead voters, may reasonably be held to be substantial compliance. State ex rel. Mercer County v. Gordon, 242 Mo. 615, 147 S.W. 795; State ex rel. City of Memphis v. Hackman, 273 Mo. 670, 202 S.W. 7. However, when time requirements are so specifically stated as those in Section 7369, it seems to us that calling anything less substantial performance would amount to judicially amending the statute. # # # " (Underscoring ours.)

We are of the opinion, therefore, that if the facts are as stated in your letter, to wit, that the notice was not posted until May 31 for an election held on June 14, under the foregoing decision of the Supreme Court the election is void.

You do not state whether or not the record filed with the county clerk contains any reference to the date of posting of the notice. However, both school districts involved in their estimates have ignored the results of the election. The county clerk is authorized to extend the taxes for school purposes only upon receipt of the estimates of the various districts. Section 10395, R. S. Mo. 1939, re-enacted Laws 1945, page 1629. The Ethel School District in its estimate has not included School District C. D. #2, and School District C. D. #2 has filed its separate estimate. Since the county clerk is authorized to act only on the basis of estimates filed with him, he should extend the taxes for the Ethel Special School District and for School District C. D. #2 separately, at the rates authorized for the respective districts.

Conclusion.

Therefore, it is the opinion of this department that where an election on the question of annexation of a school district is held after posting of notice thereof for fourteen days instead of for the fifteen days required by Section 10418, R. S. Mo. 1939, the election held under such notice is void, and the county clerk should extend the taxes for the districts involved in accordance with the estimates of said districts filed with him without regard to the attempted annexation.

Respectfully submitted,

ROBERT R. WELBORN Assistant Attorney General

APPROVED:

J. E. TAYLOR Attorney General

RRW:ml

DIVISION OF WORKMEN'S COMPENSATION:

The Division of Workmen's Compensation may make a nunc pro
tunc order of record showing the
acceptance by an employer of the
workmen's compensation amendment
with respect to occupational
disease where there has been substantial compliance with subsection (b) of Section 3695,
R.S. Mo. 1939.

September 8, 1949

Honorable Spencer H. Givens Director Division of Workmen's Compensation Jefferson City, Missouri FILED 23/24 33

Dear Director Givens:

This will be in response to your request to this department for an opinion on the question of whether there has been compliance on the part of General Wesco Stove Company, a corporation, employer, of Springfield, Missouri, with sub-section (b) of Section 3695, R.S. Mo. 1939, in electing to bring itself, with respect to occupational disease, under the Missouri Workmen's Compensation Act, and whether the Division of Workmen's Compensation may now, as of March, 1944, make an order of record that the said employer has elected to bring itself under the occupational disease amendment incident to the claim of Ira D. Fetter, an employee of said company, for compensation for disability occasioned by an occupational disease acquired in the course of his employment. Your letter in that behalf is as follows:

"Enclosed herewith is a 'Request for Order of the Division of Workmen's Compensation Holding Substantial Compliance with Acceptance of Occupational Disease Amendment,' which was filed with us yesterday by Ira D. Fetter, employee, General Wesco Stove Company, employer, and American Mutual Liability Insurance Company, insurer. In view of the nature of the request, we feel that this matter should properly be turned over to you, as our duly constituted legal adviser, for an opinion.

"I felt that the Occupational Disease Acceptance files of the two employers mentioned in the request -- that is, the General Wesco Stove Company and the Woods-Evertz Stove Company -should be sent along with this letter so that

you might have the benefit of them in connection with the request."

There is submitted with your request for this opinion, as the background and history and present constituent facts of the case, a statement duly executed by Mr. Ira D. Fetter, the employee, General Wesco Stove Company, a corporation, employer, and American Mutual Liability Insurance Company, insurer. The facts, as revealed by the said statement, are: That the employer, General Wesco Stove Company, a corporation, at Springfield, Missouri, engaged in the manufacture of stoves and related products and equipment, succeeded in said enterprise and manufacturing business in 1944, the Woods-Evertz Stove Company, also a corporation; that in 1934, the selling or disposing corporation, Woods-Evertz Stove Company had elected to accept the terms of said sub-section (b) of Section 3695, to bring itself within the terms of said section with respect to occupational disease; that upon the taking over of the business and the operation of the business of the Woods-Evertz Stove Company by the General Wesco Stove Company in 1944, the business was continued with apparently the same personnel, the same incidents of business administration, with the only noticeable change being, as it is said, the name of the operator of the business. At all times referred to in said statement of facts, and referred to in this opinion, American Mutual Liability Insurance Company of Boston, Massachusetts, was, and continues to be, the workmen's compensation carrier for the two respective corporations engaged, respectively, the one succeeding the other, in the named business.

The said statement of facts recites that there was a foundry operated in connection with the said manufacturing business for some years prior to 1944, and during the ownership and operation thereof by Woods-Evertz Stove Company. The foundry element of the business was, at the beginning thereof, carried on by a number of the older employees of the foundry department of the business as a rather independent activity under an agreement with Woods-Evertz Stove Company.

The employees of the foundry operating that part of the business composed themselves into a co-partnership, and, as such, took over the exclusive operation of the foundry, with the knowledge and approval of Woods-Evertz Stove Company, the partnership exercising the right of hiring and discharging the employees of the foundry and carrying on all negotiations with the union with which it was affiliated respecting its contract. The foundry billed back to the Woods-Evertz Stove Company the credit charge for castings produced, and, thereafter, at regular periods a settlement between the

Woods-Evertz Stove Company and the partnership was had, and from the amount found to be due there was deducted the cost of raw material used by the foundry and ordered by the corporation in behalf of the partnership. Also were deducted insurance premiums and any other payroll deduction covering the employees of the partnership operating the foundry in accordance with the terms of the agreement between the stove company and the partnership in the foundry and under which the authors of said statement all agree that the workmen's compensation coverage including occupational disease was arranged for and the policy issued to the Woods-Evertz Stove Company, the corporation.

At the time General Wesco Stove Company took over the business from Woods-Evertz Stove Company in 1944, this same agreement was carried over with the partnership. The General Wesco Stove Company, like the Woods-Evertz Stove Company, took no part in the operation of the foundry, which was conducted solely by the partnership, but it was, nevertheless, as we understand from the statement and the facts, a recognized part and instrumentality of the manufacturing business itself carried on by the corporation.

When the General Wesco Stove Company assumed and took over the operation of the business in 194, the insurance carrier prepared and forwarded a notice to General Wesco Stove Company for its execution and filing with the Workmen's Compensation Commission, on form 67a, constituting its election to bring General Wesco Stove Company, the said corporation, with respect to occupational disease, within the provisions of the Compensation Act, or to return the said notice of acceptance to the insurance carrier at Kansas City, Missouri, whereupon the carrier would file the same with the Commission for the corporation. The insurance carrier later, and pursuant to its preparation and forwarding of said notice of election, in the belief that it had been filed with the Commission, requested and received notice of compensation rating from the rating bureau setting out the rate fixed by the rating bureau for coverage of occupational disease, and under which rating General Wesco Stove Company continued to pay its premiums which included occupational disease rates and sums, which premiums were accepted by the carrier, each believing and understanding that sub-section (b) of Section 3695 had been fully complied with by the filing of said acceptance with the Workmen's Compensation Commission by General Wesco Stove Company.

The operation of the business continued under the belief by all concerned that the employer was under the Act as to the

occupational disease amendment. No employee of the General Wesco Stove Company, filed with the Commission and his employer any written notice that he elected to reject the acceptance by the employer of the occupational disease amend-ment as provided for in said sub-section (b) of Section 3695. It seems, however, that some employee of the office of General Wesco Stove Company, without understanding of its importance, laid aside or misplaced the said acceptance prepared by the insurer on form 67a for execution by General Wesco Stove Company and the filing thereof with the Commission, and the same was overlooked or lost, and the attention of no one was further called to it being at the office of the corporation. This situation was first learned in consequence of Mr. Ira D. Fetter, one of the members of the said partnership operating the said foundry, who had been an employee of the foundry for about forty years, on May 28, 1948, becoming disabled and unable to continue his duties because of contracting silicosis and a heart condition resulting therefrom arising out of and in the course of his employment. The employer, believing that it was, and intending to be, under the occupational disease amendment, caused the condition of the employee to be established by medical examination and reported the same to the American Mutual Liability Insurance Company, the compensation carrier, and upon investigation the carrier provided medical attention according to the terms of the Act believing that the employer and the employee were under said amendment to the Act, and upon investigation accepted Mr. Fetter's claim as compensable and began issuing to him regular weekly checks in the amount of \$20.00 per week, the maximum rate for such condition. The carrier provided medical attention for the employee in accordance with the terms of the Act, and in accordance with the terms of their policy. The case was promptly and properly reported to the Division of Workmen's Compensation. The employee. the employer and the carrier all have conducted themselves, both before and since it became known that the actual filing of the acceptance of the occupational disease amendment had been overlooked, as if the Act had been literally complied with as to the filing of said notice of acceptance, by the doing and approving and participating in and discharging the obligations resting upon each and all of them, both under the contractual relationship of policy coverage and the terms of the occupational disease amendment itself. But, since the physical act of filing the notice of acceptance itself with the Commission in 1944, upon the assumption of the operation of the business of the General Wesco Stove Company, was not performed, the question here, and the only question, we believe, for solution is, was there at the time, and has there since,

by reason of the aforesaid acts of the employer and the carrier, with respect to accepting the occupational disease amendment by the employer, been substantial compliance with said amendment.

The question also arises that, since there was no literal compliance with the amendment by the execution and the filing of the election by the employer to accept the amendment on March 1, 1944, and if there has been substantial compliance with the amendment by the employer, does the Commission have jurisdiction to make an order of record now as of March 1, 1944, that the employer has accepted the said occupational disease amendment, so as to legally establish liability upon the employer and the carrier herein for the payment of compensation for occupational disease arising out of and in the course of their employment by the employees of said employer in like manner as the Commission would have done had the written election been actually filed with the Commission on March 1, 1944.

With these questions in view we should keep in mind the facts that the employer paid to the carrier, upon special rating in that behalf by the rating bureau, additional insurance premiums necessitated by the inclusion of occupational disease as being compensable and the employer and the carrier have paid compensation to the employee for almost a year, under the belief that they were, and in fact had the intention of being under the occupational disease amendment.

We believe the Commission has the jurisdiction and thereunder, the lawful power to make such an order nunc pro tunc, and pursuant thereto, to approve the agreement between the employer and the carrier on the one hand and the employee on the other hand, that the employee shall be paid as he is now being paid compensation for occupational disease under the authority and approval of the Commission and under the terms of said sub-section (b) of Section 3695, R.S. Mo. 1939.

In consideration of this and any other question arising in the discussion and construction of the Workmen's Compensation Act of this State, to give full and complete effect to the intent of the Legislature, as expressed in the several sections of said Act, we must keep in mind the terms of Section 3764 of the Act, which states:

"All of the provisions of this chapter shall be liberally construed with a view to the public welfare and a substantial compliance therewith shall be sufficient to give effect to rules, regulations, requirements, awards, orders or decisions of the commission, and they shall not be declared inoperative, illegal or void for any omission of a technical nature in respect thereto."

The St. Louis Court of Appeals in the case of Murphy vs. Corporation, 155 S.W. (2d) 284, in discussing Section 3374, R.S. Mo. 1929, which is, and was noted in the case as being our present Section 3764, R.S. Mo. 1939, supra, 1.c. 287 in giving effect to said section said:

> "In construing and applying the last abovementioned section of the compensation law, our Supreme Court has held that the law should be liberally construed as to the person to be benefited, and that doubt as to the right of compensation should be resolved in favor of the employee. * * * ."

Sub-section (b) of said Section 3695, confers general jurisdiction upon the Commission to hear and determine claims of employees for compensation arising out of occupational disease, and in the exercise of that jurisdiction the Commission may consider and determine claims in individual cases by consent of the employee, the employer and the carrier, where there has been substantial compliance with the statute by the employer in accepting said amendment. We believe the statement of facts submitted to this department by the parties interested and the recapitulation thereof, at the beginning of this opinion, show there has been substantial compliance with the amendment by the employer. This, we believe, requires an understanding of what is meant by "substantial compliance", in this case, with sub-section (b) of said Section 3695, as the phrase has been defined by the text-writers and the Courts. 60 C.J., page 677, defines the phrase in the following text:

> "Substantial compliance. The compliance with the essential requirements, whether of a contract or of a civil or criminal statute."

Our St. Louis Court of Appeals had before it for construction the phrase "substantial compliance", in the case of Railroad vs. Houck, 120 Mo. App. Rep., page 634. The case is quite too lengthy to quote extensively here. We will content ourselves with a very brief statement of the background of the case and the definition given by the Court of the phrase

"substantial compliance." The suit grew out of a subscription made by a person for the construction of a raileroad, provided it went through or into the town of Bloomfield, Missouri. After the signing of the subscription paper by the defendant in the case, the town of Bloomfield voted to extend its corporate limits some 1900 feet north of the north limits of the town as they were when the subscription was made. The railroad was constructed through a very small portion of a corner of the newly added territory, but far removed the railroad and a new depot from the property of the subscriber. The Court held that there was no substantial compliance with the contract evidenced by the subscription paper on the ground that the subscriber would derive no benfit from the construction of the road because it and its accommodations were so far removed from his property that there was a practical failure of consideration. The Court, 1.c. 648, 649, so helding, defined "substantial compliance" as follows:

"* * By substantial compliance we understand that, although the conditions of the subscription be deviated from in trifling particulars which do not materially detract from the benefit the subscriber would derive from literal performance, but leave him substantially the benefit he expected, he is bound to pay. * * ."

Looking at the acts of the parties in interest in this case, taking the view the Court of Appeals had in defining substantial compliance in the case cited, we must conclude that the failure to file its written acceptance of the occupational disease amendment by General Wesco Stove Company, when it assumed the business of the enterprise, did not change the interests or rights of any person concerned nor were they in anywise materially affected or damaged thereby, but on the contrary, left them all substantially in the same position as to their then, their present and future rights as if the written acceptance had actually been filed. The status of the parties in interest was not changed by such technical failure, and by carrying out fully and completely the terms of the Act resulting in the payment of compensation to the employee who contracted occupational disease arising out of and in the course of his employment as if the amendment had been strictly complied with, we believe the statute has been substantially complied with.

We believe that, while the Workmen's Compensation Commission has general jurisdiction under said sub-section (b) of occupational disease as a subject for compensation, it is necessary for the employer in the individual case to so substantially comply with the terms of said sub-section (b) of said Section 3695, that jurisdiction may be lawfully lodged in the Commission in the individual case. Thus believing, if there has been substantial compliance with sub-section (b) by the employer, as we are convinced there has been in this case, such substantial compliance will suffice to give to the Commission jurisdiction over the individual case here and of the persons to be affected. On this question 15 C.J. 807, states the following text:

> "Where the court has jurisdiction of the subject matter, jurisdiction over the particular action may be conferred by consent; * * * . The principle as to consent has been held to be applicable only to the question of general jurisdiction to adjudicate as to the subject matter and not to the question whether the particular facts of the case bring it within that conceded jurisdiction. * * * ."

Our Supreme Court discussed the question of the elements of jurisdiction and laid down clearly and effectively the rule of what constitutes the acquisition of jurisdiction by Courts, both of the subject matter and the person, in the case of State vs. Nixon, 133 S.W. 240. We believe that case will be sufficient to satisfy the statute here, and to convince this Commission that it had jurisdiction of the subject matter on March 1, 1944 by the terms of the statute and that jurisdic-tion of the individual case and of the persons in interest in the individual case later was acquired by consent of the parties by reason of a substantial compliance by them with said sub-section (b), and in the exercise of such jurisdiction the Commission may make, now for then, an order of record that the employer has elected to accept the occupational disease amendment under the terms of said sub-section (b). The Court. 1.c. 342, on the principle, said:

> " * * * Jurisdiction is of two kinds -- one of the subject, the other of the parties-and both must exist in order to authorize the court to try and determine the cause. Unless the law gives the court jurisdiction of the subject, jurisdiction cannot be acquired by the consent of the parties, but, if the law gives jurisdiction of the subject, the court may acquire jurisdiction of the parties by their consent. If A. and B. both reside in this state and A. should sue B. for a debt in

the circuit court of a county in which neither resides, and the writ is served on B. in that county, the court would have jurisdiction of the subject—that is, jurisdiction of subjects of that character—but it would not have juris—diction of that case by virtue of the service of the process. But if B., without challenging the jurisdiction of the court should file his answer pleading to the merits, neither party could afterwards question the jurisdiction of the court because by their actions they are conclusively presumed to have consented to give the court jurisdiction of their persons—that is, their personal rights—in that case. * * * ."

The question of the formal compliance with a statute under the Compensation Act of Missouri, by the giving of a notice, or the failure to so comply with such statute by failing to give the notice, required to be posted in and about the place of business of an employer, as bearing upon the jurisdiction of the Commission to award compensation, or the substantial compliance with the statute in such regard, so as to confer jurisdiction without such posted notice, was before our Kansas City Court of Appeals in the case of Brollier vs. Van Alstine, et al., 163 S.W. (2d) 109. The case is lengthy, quite too much so to give an extended statement of the facts, but we may apply the rule announced by the Court growing out of the main question in the case, we believe, by stating briefly the immediate facts of the case. The case was one where a co-partnership existed. The question arose in the case whether or not the acceptance of the Act by the copartnership was completed because notices were not posted in and about the place of business of the employer as required by Section 3693, R.S. Mo. 1939. There was no evidence of posting the notices, so the case recites. But the acts and conduct of the employer and all others connected with the case, and brought into view in the claim filed by Brollier for compensation, had been performed and carried out as if the notices had been posted as required by the statute, and as if every other fact necessary to bring the employer under the Act had been fully complied with. The Court in sustaining the award of compensation to the employee, and holding that, even if the notices were not posted as required by the statute, everything else being done as if such notices had been published, the actual failure to post the notices did not affect the right to compensation or the jurisdiction of

the Workmen's Compensation Commission to award it. The Court, in so expressing itself, l.c. 112, said:

"It is next urged that the acceptance was never completed in law so as to become binding on the employer because no notices were ever posted in and about the place of business of employer, as required by Section 3693, R.S. Mo. 1939, Mo. R.S.A. Sec. 3693. The record is silent so far as direct evidence of the posting of the notices mentioned in said section is concerned. However, all of the testimony indicates that employer intended to operate under the Act and thought that he was doing so. He filed acceptance of it, although he stated that he did not specifically remember such filing. He took out insurance under it. He paid premiums on said insurance, said premiums being based upon the number of employees he had in his employ, plus those in the employ of sub-contractors working under him. When the instant contract was entered into he caused insurer to send certificates of his insurance to Anthony, to Bliss Realty Company, and to the owner of the property. His agent, Anthony, acting for him, employed claimant and told him that Van Alstine was one of his employers, that claimant would work under the Compensation Law, and that he In the absence would be covered by insurance. of proof to the effect that notices were not, in fact, posted, and in view of proof of his agent's direct statement to claimant that Van Alstine was an employer and was under the Act, we think there is substantial evidence to give rise to the inference that all formalities necessary for compliance with Section 3693, R.S. Mo. 1939, Mo. R.S.A. Sec. 3693, were complied with, including the posting and maintenance of notices. * * * ."

It is believed that under the facts of this case as submitted by the joint statement of all the parties in interest of their substantial compliance with, and the expressed intention by the conduct of each and all of such parties to come under, the terms of said Act, that this Commission is clothed with complete jurisdiction to make an order that there has been such substantial compliance with the terms of sub-section (b) of

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Section 3695, R.S. Mo. 1939, as to bring the parties within the terms of said amendment, and that the Court has jurisdiction to so rule and order. The only remaining question, we think, is, whether the Commission may make an order of record in its record now, in view of the substantial compliance with the statute by the parties, as of March 1, 1944, that the General Wesco Stove Company, the employer herein, has accepted the occupational disease amendment. This brings again to attention, Section 3764, of the Compensation Act, supra, which requires all of the Workmen's Compensation statutes, Chapter 29 of our statutes, to be liberally construed in the entire administration of the Act to the disregard of matters of any technical nature in respect thereto. We believe that in obedience to the terms of said statute the Commission has the right to make its order of record now as of March 1, 1944, reciting that on that day General Wesco Stove Company, a corporation, had elected to accept the terms of the occupational disease amendment, sub-section (b) of Section 3695, R.S. Mo. 1939. The making of a "nunc pro tunc" entry" has long been, by both convenience and necessity, followed by the Courts for the perfection of their records to make their judgments express the decrees and decisions of the Courts. We find in neither text nor decision any rule which would prevent corporations, individuals or public administrative bodies, likewise, at a later date from making an order in their records of the carrying on of incidents of their business as of a previous date, if such be the fact. There is no person complaining here. All of the parties in interest involved in this proceeding desire this to be done. We see no reason in either fact or law why it should not be done.

CONCLUSION

Considering the above recited facts and the above cited and quoted authorities, it is the opinion of this department that the Division of Workmen's Compensation of this State has jurisdiction to make an order at this time as of March 1, 1944, showing that General Wesco Stove Company, a corporation, has accepted the occupational disease amendment to Section 3695, R.S. Mo. 1939, as provided in sub-section (b) of said Section 3695.

Respectfully submitted,

APPROVED:

GEORGE W. CROWLEY Assistant Attorney General

J. E. TAYLOR Attorney General

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LEGISLATURE LEGISLATIVE RESEARCH COMMITTEE

) Legislative Research Committee of) General Assembly cannot delegate to Executive Committee or other subcommittees or director power to employ or discharge staff members or other employees.

September 20, 1949

9/26/49

Senator Floyd R. Gibson Missouri Senate Jefferson City, Missouri 33

Dear Sir:

This is in answer to your letter of recent date requesting an official opinion of this Department, and reading as follows:

of the Legislative Research Committee relative to the powers of its Executive Committee to appoint, employ, or discharge employees of the Committee. The question was raised whether or not the Committee, as a whole, could delegate such powers to its duly appointed Executive Committee under the law setting up the Legislative Research Committee. Request was made in said motion to solicit an opinion from the Attorney General on this matter.

"Herewith is set out in full an excerpt from the minutes of the Legislative Research Committee on this question:

"'After considerable discussion relating to the powers and duties of the Executive Committee, Mr. Frisby moved that a committee of four be appointed to draft a rule with respect to the powers of the Executive Committee to appoint, employ or discharge employees of the Committee and that they be authorized to request an opinion of the attorney-general to interpret the statute setting up the Committee on Legislative Research as to whether the Committee has power to delegate authority to the Executive Committee or other sub-committees or to the director to employ and discharge staff members or other employees. Motion seconded by Senator Frisby. Carried. !

"As I have been appointed Chairman of a committee to make recommendations on the matter, I would appreciate receiving your opinion by September 23, if possible, so that I may have a meeting of this committee before the first of the month."

Section 14737, Laws of Missouri, 1945, page 1136, provides as follows:

"There is hereby established a permanent joint committee of the general assembly, to be known as the committee on legislative research, to be comprise of ten members of the senate and ten members of the house of representatives whose offices shall be located in the Capitol Building, Jefferson City, Missouri. The senate members of the committee shall be appointed by the president pro tem of the senate and the house members shall be appointed by the speaker of the house, and their appointments shall continue during their terms of office as members of the general assembly, or until a successor shall be duly appointed to fill the place of any committee member whose term of office shall have expired. No major party shall be represented by more than six members from the house, nor more than six from the senate on such committee. The general assembly, by a majority vote of the elected members, may discharge any or all of the members of the committee at any time and select their successors."

Section 14738, Laws of Missouri, 1945, page 1126, provides as follows:

"The Committee on Legislative Research shall meet within ten days after its creation and organize by selecting a chairman and a vice chairman, one of whom shall be a member of the Senate and one of whom shall be a member of the House of Representatives. The Research Director shall serve as secretary to the Committee on Legislative Research. He shall keep the records of the Committee and be subject to the jurisdiction and order of the Committee during the vacation or recess of

the General Assembly. The Committee on Legislative Research shall have the authority to employ two custodians, one for the Senate chamber and one for the House chamber in the state capitol building. The regular meeting place of the Committee shall be in Jofferson City, Missouri, and after its inception and organization it shall regularly meet at least once every three months. A majority of the members of the Committee shall constitute a quorum and its membership shall serve without compensation, but shall be entitled to mileage and necessary expenses incurred while attending any meetings of the Committee within the state. Special meetings of the Committee may be called at such time and place within the state as the chairman thereof may so designate. Provided, no member shall receive for ' such expenses more than \$250.00 for any period of two calendar years."

(Underscoring ours.)

Section 14745, Laws of Missouri, 1943, page 632, provides as follows:

"The Committee is authorized to regularly employ for a period not exceeding two years, from date of appointment, and fix the compensation of, a research officer, who shall be competent to assume administration of the necessary activities of the Committee under the direction of the Committee. The Committee shall also be authorized to employ such other clerical and research assistance as it may deem necessary within the limits of the appropriation made out of the general revenue of the state for the purpose of carrying out the provisions of this article. Said Committee shall also fix the compensation of the custodians of the House and the Senate and shall make and enforce reasonable rules and regulations for the care of the Senate and House chambers, including the bill rooms, and filing rooms, and the furniture, files, and supplies therein. Said

Committee is authorized to provide necessary legal reports and other publications to be kept in the library of the Committee; and to pay for same out of any appropriations made to such Committee. The Secretary of State is hereby authorized to furnish the librarian, without charge, such number of Missouri statutes and acts as may be desired by the Committee to enable it to exchange such acts for those of other states."

(Underscoring ours.)

The rule in Missouri with regard to delegation of authority is found in the case of State ex rel. v. Reber, 226 Mo. 229, where the Supreme Court In Bang said at 1.c. 234 and 1.c. 237:

"As has been said already the duties of the president of the board of public improvements are of two kinds, the one is such as requires the exercise of discretion and judgment, involving often scientific and technical knowledge, the other requires the performance of mere ministerial or clerical work. The duties first mentioned cannot be delegated, those of the ministerial kind may be delegated with proper care.

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"* * * An officer to whom a discretion is entrusted by law cannot delegate to another the exercise of that discretion, * * *"

In the case of Stoughton & al. v. Baker, 4 Mass. 522, 3 Am. Dec. 236, the Supreme Judicial Court of Massachusetts had before it a case in which a committee of three was appointed by the Legislature of Massachusetts to inspect dams on a specified river, order alterations or cause new fishways to be built as in their opinion or a major part of them should be sufficient. Such committee appointed one Loud as a sub-committee. The court said, 1.c. 530 of the Mass. Rep.:

"The authority given to the committee is by the terms of the resolve to be exercised by them. or the major part of them. The exercise of this authority is personal, and cannot be delegated. If it could be delegated, it might be delegated to any other man, as well as to Mr. Loud, one of the committee. If the committee or a major part of them had exercised the powers given them, it might have been thought by them reasonable to give the defendants time until the next spring to make the alterations; or they might have employed other persons than the plaintiffs to make them. However this might have been, it is extremely clear that the powers given to the committee must be exercised by all, or by the greater part, and that they could not be delegated to Mr. Loud, or to any other person."

Prom the quoted statutes establishing the Legislative Research Committee of the Missouri General Assembly, we believe it to be clear that the committee must act in the employment or discharge of employees of such committee. We believe this to be evident from the provision in Section 14738 that a majority of the members of the committee shall constitute a quorum, and the provisions in Section 14746 that, "the committee" is authorized to employ such assistants as it may deem necessary. We can find no authority whatsoever in the statutes creating the Legislative Research Committee for such committee to delegate its authority to an executive committee or the director of the Legislative Research Committee.

CONCLUSION.

It is the opinion of this Department that the Legislative Research Committee of the General Assembly of Missouri has no authority to delegate to the executive committee or other subcommittees or the director of the Legislative Research Committee the power to employ and discharge staff members or other employees.

Respectfully submitted,

APPROVED:

C. B. BURNS, JR. Assistant Attorney General

J. E. TAYLOR Attorney General

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CIRCUIT COURT: care in other circuit when requested to do so by judge of that circuit.

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October 13, 1949

10/27/49

Honorable James Glenn Prosecuting Attorney Macon, Missouri

Dear Sir:



Your recent opinion request reads as follows:

"In view of the recent opinion in the case of State of Missouri vs. Scott which I believe was handed down by the Supreme Court on September 9, a question has been raised as to a criminal trial now pending in this county. Your opinion is requested as to the procedure to be followed in the trial of this case.

"The facts are in this case that the defendant was charged with sodomy. After the case had been pending some time and in order to avoid trial the defendant filed a verified motion disqualifying the local Circuit Judge for prejudice. The local Judge called in Judge Walter A. Higbee of the 37th Judicia Circuit. Later a trial was held at which Judge Walter A. Higbee presided and resulted in a mistrial.

"Later, in order to avoid trial, the defendant filed a verified motion alleging prejudice of the inhabitants of this county against the defendant. On change of venue the case was sent to Shelby County, the only other county in this judicial circuit.

"In view of the recent decision in the above named case, it is felt that we will be met' with the challenge as to Judge Higbee's right to try this case." * * * *

The question is whether or not Judge Highee has authority to hear this case. We assume that the request to do so, made by

the local judge, was prompted by the provision of Section 4040 R.S. Missouri 1939, and that the request was in proper form with respect to this statute. However, a recent opinion of the Supreme Court of Missouri indicates the doubtful validity of Section 4040 and related sections under the 1945 Constitution.

We quote from this opinion of the Supreme Court of Missouri, State of Missouri v. Afton Scott, which has handed down on September 26, 1949, and which has not as yet been reported:

> " # # # Defendant's plea to the jurisdiction challenges the authority of Judge Maughmer to try the case. He was transferred to the Wright Circuit Court by an order of the Supreme Court made pursuant to Sec. 6, Art. V, Const. of Mo., 1945, and rule 11 of the Supreme Court. The facts are these: Judge Moulder, who succeeded Judge Jackson as the regular judge of the Wright Circuit Court, being unable to hold the June, 1948 Term (at which this case was docketed), made an order calling in Judge Blair of the 14th Circuit.. Defendant filed an application for a change of venue "from Judge Blair," which Judge Blair sustained, but he did not call in another judge. Instead, Judge Moulder reappeared, and entered an order disqualifying himself, and requesting the Supreme Court to transfer another judge to sit in the case under the constitutional provision above mentioned. This was done, and Judge Maughmer was ordered transferred. Defendant contends that when the change of venue was taken from Judge Blair, it became his duty, under Sec. 4040, R.S. 139, to call in another judge to try the case. It will be observed, that under the express provisions of that section, the duty to call in another judge arises only "if, * * * no person to try the case will serve when elected as such special judge" (provision for the election of an attorney possessing the qualifications of a circuit judge being made by Sec. 4038, R.S. 139). These sections would seem to be of doubtful validity under the 1945 Constitution, but as that question is not briefed, it will not be determined. It may be well enough to point out that under Section 29, Article VI of the

1875 Constitution, certain provisions were made respecting substitute judges, and that the General Assembly was expressly authorized to "make such additional provision for holding court as may be found necessary." The new Constitution contains no such provision, On the contrary, its provisions are: "Any Circuit judge may sit in any other circuit at the request of a judge thereof." (Sec. 15, Art. V.) "The supreme court may make temporary transfers of judicial personnel from one court to another as the administration of justice requires, and may establish rules with respect thereto." (Sec. 6, Art. V.) Even if Sec. 4040 is still valid, it cannot be thought to override the later constitutional provision just mentioned. We hold Judge Maughmer's transfer under Sec. 6, Art. V, to be valid, and he was, accordingly clothed with authority to hear the case."

Section 6 of Article V, Constitution of Missouri 1945, appears in the above quotation, Section 15 of this Article reads as follows:

"The state shall be divided into convenient circuits of contiguous counties. In each circuit there shall be at least one judge. The circuits may be changed or abolished by law as public convenience may require, but no judge shall be removed thereby from office during his term. Any circuit judge may sit in any other circuit at the request of a judge thereof. In circuits composed of a single county and having more than one judge, the court may sit in general term or in divisions."

Therefore, we see that there are two separate and distinct constitutional provisions whereby a circuit judge may be authorized to sit in a circuit other than his own. That these provisions are distinct and are so recognized by the Supreme Court is evidenced by Rule 11 of the Supreme Court of Missouri, wherein the provisions are treated as separate and distinct. Sec. 11.01 of Rule 11 reads:

"Under Section 6 of Article 5 of the Constitution the Surreme Court may temporarily transfer a judge of any appellate or circuit court, with the consent of such judge, to any other appellate or circuit court:

- "(a) When an appellate court or circuit court requests the transfer of a judge to it; or
- "(b) When the Supreme Court finds the administration of justice requires such transfer and orders same."

Section 11.03 of Rule 11 reads as follows:

"A circuit judge requesting another circuit judge to sit in his circuit under Section 15 of Article 5 of the Constitution shall send a copy of such request to the Chief Justice of the Supreme Court."

Furthermore, this position is clearly indicated by Section 11.04 of Rule 11, which reads:

"Circuit Judges, sitting either by request of the regular judge or by transfer order of the Supreme Court, may hold court in the same county and at the same time either with or separately from the regular judge or judges of the circuit."

Therefore, even though Section 4040 might be held invalid as indicated in State v. Scott, supra, no reversible error would arise by Judge Highee's hearing the case in this instance, as he had been requested to do so by the local judge, and is therefore authorized to hear the case by reason of Section 15 of Article V of the 1945 Constitution.

CONCLUSION.

It is therefore the opinion of this department that a circuit

judge is authorized under Section 15 of Article V, Constitution of Missouri 1945, to hear a case in a circuit other than his own when requested to do so by the circuit judge of that circuit.

Respectfully submitted,

RICHARD H. VOSS Assistant Attorney General

APPROVED:

J. E. TAYLOR Attorney General

RHV:p

SHERIFFS IN THIRD CLASS COUNTIES: Sheriff who has been appointed to serve as probation officer in a county of the third class shall be allowed and paid by the county the necessary expenses incurred in delivering girls to the State Industrial Home at Chillicothe, Missouri, and return and the necessary expenses paid on account of said girls.

December 16, 1949

FILED 33

Mr. Charles E. Ginn Prosecuting Attorney Lawrence County Mt. Vernon, Missouri

Dear Sir:

I.

We have the following request for an official opinion from you, which request reads as follows:

"I would like your opinion as to the fees allowed to the Sheriff for taking girls from this county committed to the Girls school at Chillicothe by committment of the juvenile court.

"Our sheriff recently transported two girls so committed to the Industrial Home at Chillicothe, and he employed a woman attendant to assist him. He made the trip in his own automobile and completed the round trip in one day. What would be his fees for such trip? Under what Sections of law do you determine the same?"

Section 9004, as amended by Laws of Missouri, 1947, Volume 2, page 320, provides as follows:

"In all cases in which children are committed to the board of training schools, the juvenile officer shall deliver the children to the institution designated by the board, and shall be allowed the necessary expenses incurred in such delivery for himself and the child and in returning therefrom, to be paid by the county."

In your letter requesting the opinion you did not state that the sheriff had been appointed or designated by the juvenile division of the circuit court of your county to act as the juvenile officer for the committment of the girls from your county to the Mr. Charles E. Ginn

State Industrial Home for Girls at Chillicothe, Missouri. We assume that he was so appointed or designated by the court and therefore when acting as the juvenile officer for delivering the girls to said institution he would be entitled to his necessary expenses incurred in such delivery for himself and the girls and in returning therefrom.

Section 9708, R. S. Mo. 1939, provides as follows:

"The circuit judge shall designate or appoint an officer of the county or some other person to serve as probation officer under the direction of the court in cases arising under this article. The court may also designate or appoint one or more persons to act as deputy probation officers."

Section 9711.2 Mo. R.S.A. 1939, Laws of Missouri, 1945, page 630, Section 1, provides as follows:

"The probation officer in counties of the third class shall receive such salary as the circuit court may with the approval of the county court prescribe, not exceeding \$1,000 per annum in counties of 20,000 or more inhabitants and not exceeding \$300 in counties of less than 20,000 inhabitants. Deputy probation officers in counties of the third class shall receive such salaries as may be prescribed by the circuit court with the approval of the county court, not exceeding \$500 per annum in counties of 20,000 or more inhabitants and not exceeding \$200 per annum in counties of less than 20,000 inhabitants."

we do not know whether the sheriff of your county has been appointed the probation officer of your county by the circuit court under the authority of the quoted sections. We believe, however, that the Legislature used the words juvenile officer in Section 9004 in 1947 to mean the same as probation officer in Sections 9703 and 9711.2, cited above, because in 1945 the Legislature in enacting laws relating to juvenile courts in second class counties stated as follows:

"In all counties of the second class, the probation officers and deputy probation officers, mentioned in this act, shall be known as

juvenile officers and deputy juvenile officers, respectively, and every reference to the former shall include the latter. The juvenile and deputy juvenile officers shall have all the powers and duties of, and be subject to all statutes applicable to probation and deputy probation officers." Laws of Missouri, 1945, page 633.

The duties of a juvenile officer are the same as the duties of a probation officer in this state, and that is another reason why we believe that there is no real difference between a juvenile officer and a probation officer.

Section 9004, R. S. Mo. 1939, before its amendment in 1947, provided in part as follows:

"* * *Sheriff, marshall or other person charged with the delivery of any person to the Missouri Training School for Boys shall be allowed the necessary traveling expenses of himself and such person, and a per diem of \$2.00 for time actually occupied in taking such person to said Missouri Training School for Boys and in returning therefrom * * *"

There is no provision in the present amended section 9004. for the sheriff to act in delivering children to the proper institution for children committed by the juvenile court. commitment must be carried out by the juvenile officer or probation officer appointed under the statute relating to the class of county in which said officer shall act. In your county the appointment would be made under the authority created by the Legislature in Sections 9708 and 9711.2, cited above, or the county court may appoint a county superintendent of public welfare instead of a probation officer by and with the approval of the juvenile court in accordance with Section 9719. Mo. R.S.A. 1939, as reenacted by Laws Mo. 1943, page 351 and Laws of Missouri, 1945, page 629. If a county superintendent of public welfare is appointed then he would act as the juvenile officer. The juvenile officer or probation officer is paid a salary as fixed by the circuit court in accordance with the limits fixed by the Legislature and he cannot charge any fees or per diem for his time or services in transporting children to the institution under the control of the State Board of Training Schools.

Said Section 9708, quoted above, provides for the appointment of one or more persons to act as deputy probation officers and they are paid a salary according to the order of the circuit

Mr. Charles E. Ginn

court with the approval of the county court within the limit set by the Legislature. If the woman attendant which the sheriff employed to assist him in transporting the girls to the State Industrial Home at Chillicothe, Missouri, had not been appointed by the circuit court to act as a deputy probation officer then she would not be entitled to any compensation or traveling expenses.

If she had been appointed deputy probation officer and the order of the juvenile court provided for her to assist the juvenile officer in the delivery of the girls to the State Industrial Home then she would receive her necessary expenses incurred in carrying out the delivery.

CONCLUSION

It is the conclusion of this department that when a sheriff of a third class county has been appointed to serve as a probation officer of that county and acts as the juvenile officer under Section 9004 as amended by Laws of Missouri, 1947, Volume 2, page 320, he shall be allowed and paid by the county the necessary expenses incurred in delivering girls to the State Industrial Home at Chillicothe, Missouri and return including any necessary expenses on accounty of the girls for meals, lodging and similar expenses.

Respectfully submitted,

STEPHEN J. MILLETT Assistant Attorney General

APPROVED:

J. E. TAYBOR Attorney General

SJM:mw (

PROSECUTING ATTORNEYS: Prosecuting attorney may sue securities of defaulting county official for monies embezzled by the said official.

September 19, 1949

Mr. Friend B. Greene Prosecuting Attorney Shannon County Court House Eminence, Missouri



Dear Sir:

This department is in receipt of your recent request for an official opinion upon the set of facts set out in your letter of inquiry, which is as follows:

"Your opinion is requested in the following:

"Under date of April 8th, 1949, the County Court of this county made its order employing the undersigned and C. P. Turley as special counsel and directed that they file and prosecute an action against Wright S. Brawley, his securities and others for the recovery of monies embezzled by the said Wright S. Brawley from the funds in his hands as Treasurer of said county; later, on the 16th day of April, 1949, I was appointed as Prosecuting Attorney for the county of Shannon, and when the audit had been returned of the Treasurers office, by the State Auditor's Office, it was determined that the bond given by Brawley when taking office in 1943 was still in full force and effect and the securities liable for at least a part of the defalcation, it was suggested by me that the securities be made parties to the suit already filed.

"At this the County Court made its order which I have enclosed directing that no action be had against these bondsmen.

"Does this fall within the scope of law laid down in the recent decision of State to the use of Consolidated Dist. No. 42 of Scott County v. Powell et al, reported at page 508 of 221 S.W.(2d), and am I bound by the order of the County Court in the premises."

From your letter quoted above it appears that on April 8, 1949, you and C. P. Turley were appointed by order of the county court of Shannon County, as special counsel, to recover from Wright S. Brawley and his securities county money embezzled by Brawley; that sometime subsequent to this April 8th appointment you and Turley did file such suit against Brawley but not against his securities; that on April 16 you were appointed prosecuting attorney of Shannon County; that sometime subsequent to your April 8th appointment and subsequent to filing the suit against Brawley you decided that his securities should be made parties to the suit filed against Brawley; that you made this suggestion to the county court; that the county court responded with the order directing that no suits be filed against the securities. You want to know of us whether you have the authority to sue these securities.

It is the opinion of this department that you, in your capacity as prosecuting attorney of Shannon county, may sue the securities aforesaid. In support of this conclusion we direct your attention to the case of State v. Powell, 221 S.W.(2d) 508. The statement of facts in that case is thus stated by the court at 1.c. 508:

"Action by the state of Missouri, to the use of Consolidated School District No. 42 of Scott County, by D. W. Gilmore, prosecuting attorney of Scott County, Missouri, who prosecutes in the name of the state of Missouri for and on behalf of the Consolidated School District No. 42, against Arthur Powell, and others, members of the board of directors of the district, and president, treasurer and secretary of the board, to recover district's funds alleged to have been illegally expended. " ""

The court then states the issue before it in this wise, 1.c. 508 and 509:

"The sole question presented on this appeal is the legal right of the prosecuting attorney of Scott county, under the facts stated in the petition and shown by the evidence, to bring and maintain this action in the name of the State and for the use and benefit of Consolidated School District No.

42 of Scott county without the consent or authority of such school district.
* * *"

In regard to the foregoing the court further says:

"Appellants argue that the prosecuting attorney has only such powers as are expressly conferred upon him by statute, and that, if a prosecuting attorney is not satisfied with the manner in which the board of directors is administering the affairs of a school district, his remedy is Quo Warranto, Mandamus or Injunction. They insist that he cannot maintain a civil suit, such as this, to obtain a money judgment on an alleged personal liability of the directors to the school district for the misappropriation of funds. Appellants further contend that only the district, by the authority of its board of directors, is a proper party plaintiff to obtain such a money judgment. Respondent has not favored us with a brief.

Section 12942, R. S. 1939, Mo. R.S.A. expressly provides that 'the prosecuting attorneys shall commence and prosecute all civil and criminal actions in their respective counties in which the county or state may be concerned * * *.' Section 12944, R. S. 1939, Mo. R. S. A., provides that 'he shall prosecute or defend, as the case may require, all civil suits in which the county is interested * * *.' Neither the word 'concerned' nor the word 'interested' is defined, but one of the definitions given for the word 'concerned' is 'affected, disturbed, troubled, interested; as to be concerned for one's safety.' Webster's New International Dictionary (2nd Edition). There can be no doubt that the state was interested, concerned and affected by the illegal transfer and dissipation of the Teachers' Fund of this school district."

* * * * *

"* * *As stated, the right of the state at the

relation of the prosecuting attorney to intervene and enjoin such illegal transfers and expenditures is not questioned. The interest and concern of the state in intervening and stopping such an illegal disposition of public funds is not questioned. We think that the right of the state by the prosecuting attorney of the county to intervene in such case and to recover, on behalf of the state and the school district, the amounts so illegally diverted and spent rests upon sound public policy and upon express authority granted by statute. Under the facts pleaded and proven we hold the prosecuting attorney of Scott county had authority to institute and maintain this action. * * *"

It seems to us that if the prosecuting attorney had the power, as the court above held that he did, to file suit against the directors of a school district, representing only part of a county, to recover money illegally spent by them, that a prosecuting attorney would have the power to sue a defaulting county official and his securities for the recovery of money belonging to the entire county, which money had been embezzled by the aforesaid county official.

Who the prosecuting attorney will sue in proceeding with his right and duty to protect the interest of his county is a matter within his discretion. Certainly the county court cannot dictate to a prosecuting attorney as to who he will or will not sue. In an opinion handed down on January 7, 1949, in the case of Rippeto v. Thompson, 216 S.W.(2d) 505, the Supreme Court of Missouri, in discussing the jurisdiction of county courts stated that:

"* * *Article VI of the new Constitution (1945) which concerns local governments, not courts, provides in part in Section 7 that the county court 'shall manage all county business as prescribed by law. * * *"

In the above opinion the court stated that county courts are ministerial bodies. As we stated above, by no possible construction of the laws of Missouri could it be found that a county court could determine who a prosecuting attorney would or would not sue. Whereas, on the other hand, from the authorities cited by the court in

the Powell case, cited above, it is equally clear that a prosecuting attorney, in pursuing his duty of filing criminal and civil suits in all cases in which his county is concerned or interested, has complete discretion in the matter of who he will or will not sue in the discharge of his duty.

CONCLUSION

It is the conclusion of this department that the prosecuting attorney of Shannon county, Missouri, in his capacity as prosecuting attorney of said county, may file suit against the securities of Wright S. Brawley for the recovery of monies embezzled by Brawley from funds in his hands as treasurer of Shannon county, Missouri.

Respectfully submitted,

HUGH P. WILLIAMSON Assistant Attorney General

APPROVED:

J. E. TAYLOR Attorney General CRIMINAL COSTS:

State not liable for costs of hospitalization of person charged with graded felony who is injured breaking from jail and attempting to escape from county jail

October 26, 1949

11/8/49

Honorable Percy W. Gullic Prosecuting Attorney Oregon County Alton, Missouri



Dear Sir:

We hereby reply to your request for an opinion of this office on the following question and facts as stated in your recent letter:

"Re: Section 9223, R. S. Mo. 1939

"Will you please advise the application of the above statute or any other pertaining to the same subject, to the following facts?

"One Henry Herbold was committed to our jail under charge of mixed felony, awaiting arraignment and preliminary examination. While so confined he forced his way out of the jail by breaking the bars thereof, then proceeding to tie blankets together in an effort to make a rope on which to descend from the jail to the ground (Our jail being on the third floor) upon climbing out of the jail and starting to descend the improvised rope, the same broke with him, letting him fall to the ground thereby breaking both legs (compound fractures) above the knees. The jailer immediately called an ambulance for the purpose of getting him to some proper place for attention, and also immediately notified his son, and they together took him to Springfield, Missouri to a hospital where he died some time later from the injuries. The day before this happening in conversation with his son the question arose as to the Mental condition of the deceased, and the son informed us that he did not want to make bond for him,

but thought it best to try to get him in one of the mental hospitals of the State.

"We feel that the officers had taken every reasonable precaution at hand to keep the deceased properly confined.

"The question now is, who is liable for the expense incurred and if the County or State should be liable, then should it be handled under the above section?"

II.

We believe that the following statutory provisions apply in this case. Section 9223, R. S. Mo. 1939, provides:

"In case any prisoner confined in the jail be sick, and, in the judgment of the jailer, needs a physician or medicine, said jailer shall procure the necessary medicine or medical attention, the costs of which shall be taxed and paid as other costs in criminal cases; or the county court may, in their discretion, employ a physician by the year, to attend said prisoners, and make such reasonable charge for his service and medicine, when required, to be taxed and collected as aforesaid."

Section 9202, R. S. Mo. 1939, provides:

"Whenever any person, committed to jail upon any criminal process, under any law of this state, shall declare, on oath, that he is unable to buy or procure necessary food, the sheriff or jailer shall provide such prisoner with food, for which he shall be allowed a reasonable compensation, to be fixed by law; and if, from the inclemency of the season, the sickness of the prisoner, or other cause, the sheriff shall be of the opinion that fuel, additional clothes or bedding, medicine and medical attention are necessary for such prisoner, he shall furnish the same, for which he shall be allowed a reasonable compensation."

Section 9203, R. S. Mo. 1939, provides:

"The expenses of imprisonment of any criminal prisoner, such as accrue before conviction, shall be paid in the same manner as other costs of prosecution are directed to be paid; and those which accrue after conviction shall be paid as is directed by the law regulating criminal proceedings."

Section 4221, R. S. Mo. 1939, as amended by Laws of Missouri 1945, page 844, Section 1, provides in part:

Section 4223, R. S. Mo. 1939, provides:

"In all capital cases, and those in which imprisonment in the penitentiary is the sole punishment for the offense, if the defendant is acquitted, the costs shall be paid by the state; and in all other trials on indictments or information, if the defendant is acquitted, the costs shall be paid by the county in which the indictment was found or information filed, except when the prosecutor shall be adjudged to pay them or it shall be otherwise provided by law."

Your statement of the facts shows that the defendant was being confined in your county jail on a mixed felony charge pending preliminary examination. We assume that you mean by a mixed felony that the crime was punishable by either imprisonment in the State Penitentiary or in the county jail, or by both fine and imprisonment in the county jail. If this assumption of your use of the term mixed felony be correct, then, if the defendant was not convicted upon the charge, Section 4223, R. S. Mo. 1939, quoted above, would apply and the county would be liable for the costs.

The Supreme Court of Missouri, in the case of Cramer vs. Forrest Smith, et al., (1943) 350 Mo. 736, 168 S.W.(2d) 1039, considered the question of taxing payment of a transcript as an item of criminal costs and said, 1.c. 739, 740:

- "(1) 'At common law costs as such in a criminal case were unknown. As a consequence it is the rule as well in criminal as in civil cases that the recovery and allowance of costs rests entirely on statutory provisions—that no right to or liability for costs exists in the absence of statutory authorization. Such statutes are penal in their nature, and are to be strictly construed.' (20 C.J.S. p. 677.)
- "(2) Sections 4221 and 4222 impose liability for costs (except those incurred on the part of defendant) on the state or county, respectively, on conviction of an indigent defendant under the particular circumstances enumerated in said sections. Where the defendant is acquitted, liability for costs is imposed under the formula prescribed by Section 4223.
- "(3) It is not contended that the provision of Section 13344, that the 'court reporter's fee for making the same (transcript) shall be taxed against the state or county as may be proper, ' (Emphasis ours) which is found in Chapter 94 in relation to court reporters, authorizes a judgment, as for costs, against either the state or county as of the time the order is made. A fair construction requires us to hold that the language means said fee is to be taxed as costs, in the same manner as other costs are taxed, but with ultimate liability for the same on the state or county as may be proper under the general statutes in relation to criminal costs. Being thus relegated to the general statutes, it is apparent the provision of Section 13344 casting liability for such transcript on 'the state or county as may be proper' cannot be reconciled with Sections 4221 and 4222, both of which expressly provide that mither the state nor county shall pay such costs 'as were incurred on the part of defendant.' Section 13344, being the later enacted statute, must be held to have repealed, by necessary implication, the contrary provisions of Sections 1221 and 4222, to the extent noted."

"* * The criminal costs statutes hereinabove set out do not contemplate that the costs in a particular case shall be paid in part by the county, and in part by the state. * * *"

The clause "except such as were incurred on the part of the defendant" in Sections 4221 and 4222, R. S. Mo. 1939, would cover and include the expense or cost of hospitalization required to treat injuries received as a result of an attempt to escape from jail by the defendant because such expense or cost was incurred or caused by the act of the defendant.

The St. Louis Court of Appeals, in State vs. Ball, 158 S.W.(2d) 182, held that an abstract printed by the defendant in his appeal was not required in a criminal case and was an expense incurred on his part voluntarily, and when this is done, the defendant cannot, if the appeal be successful, have the cost of printing such abstract taxed against the state. The court said, l.c. 183:

"The entire subject of costs is a matter of statutory enactment. It has been said that a person claiming costs is not entitled thereto unless he can point to a statute authorizing the taxation of the same. Appellant has not pointed to any statute authorizing the taxing of the costs of printing an abstract in a criminal case against the State, for the simple reason there is no such statute."

If the defendant in the above case could not have the expense of printing of an abstract that he incurred on his part taxed as costs when he was acquitted, then we believe that the expense of hospitalization caused or incurred by the attempt of Henry Herbold to escape from jail could not be taxed as costs, because there is no statutory provision for the payment or taxing of hospital expenses.

Section 9223, R. S. Mo. 1939, as quoted above, provides for the taxing of necessary medicine or medical attention as costs for any prisoner confined in the jail. This clause "confined in the jail" and the provisions of Sections 9202 and 9203 quoted above were considered in an opinion rendered to the Honorable Richard Chamier, Prosecuting Attorney of Randolph County, on October 12, 1938, in which this office held on pages 4 and 5 of the opinion as follows:

"We believe it is manifest that by reason of

the terms used in these respective statutes. to-wit, in the first one, "whenever any person committed to jail upon any criminal process," and in the second one, "the expenses of imprisonment of any criminal prisoner," and in the third one, "in case of any prisoner confined in any jail," together with the fact that all three sections appear in an article of the statutes confined to "Jails and Jailers", that the medical attention mentioned in each of the three sections refers and is confined to a person or prisoner when and while confined in jail. It is obvious that there is nothing said in the statute with reference to the right of the sheriff to obtain hospitalization for any such prisoner, nor is there any mention in such sections that the expense of room, board and nurse attendance can be pro-cured for a prisoner in a hospital and the expense of such room, board and nurse hire charged up to the State as costs in a criminal case.

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"In other words, such statutes are strictly construed against the allowance of costs against the State, and it is not permitted by intendment or liberalization to read into such statutes something that is not plainly provided for therein. Hence, we do not believe that there is sufficient justification for saying that the sheriff has the right to obtain hospitalization for anyone whom he might have lawfully in his custody, and we are constrained to the belief that the medical attention mentioned in the statutes means such medical attention as is the usual and customary attention provided for a prisoner while and when in the county jail."

Said opinion continues to be the official opinion of this office and applies to your situation.

Since your prisoner died from the injuries received in his attempt to escape, we assume that the case will be allowed to pass off the docket or will be dismissed by reason of the death of the defendant, and in either event, the defendant will not be convicted, and under Section 4223, supra, the costs would be payable by the county in the case of a mixed felony or in the case of a misdemeanor. But from what we have said heretofore, it is our opinion that the Legislature did not contemplate the expense of hospitalization as the necessary medicine and medicial attention to be given to a prisoner

as provided in Section 9223, supra, and that Section 9223, R. S. Mo. 1939, could not be construed to include hospitalization as an expense that could be taxed as costs in a criminal case against the county.

The estate of Henry Herbold would be primarily liable for the hospital expenses and his son would be liable for such expenses if he took his father into the hospital at Springfield, Missouri.

Section 4235, R. S. Mo. 1939, provides:

"The county court of any county in which a prisoner may be confined, whenever satisfied of the necessity of so doing, may make an allowance for ironing such prisoner, and may allow a moderate compensation for medical services, and extra bedding or menial attendance furnished any sick prisoner, which shall be paid out of the treasury of the county in which the cause originated."

This statute does not limit or prescribe the particular place of confinement and could be used for authority of the county court of your county to pay a moderate bill for hospitalization of any prisoner. In an emergency, the sheriff or jailer would not have time to secure authority from the county court for such expenses, but they should consider that the prisoner is entitled to humane treatment, and Section 9206, R. S. Mo. 1939, makes it the special duty of the court having criminal jurisdiction at each term to inquire and see that all prisoners are humanely treated. Therefore, a county court would be authorized if they see fit, to allow the expense of hospitalization to be paid under this Section 4235.

III.

CONCLUSION

It is the opinion of this office, in view of the reasons hereinabove stated, that hospital expenses incurred in the treatment of injuries received by a prisoner after he escapes from jail cannot be taxed as costs in the case in which the prisoner is the defendant even though he is apprehended, and that the prisoner is primarily liable for the cost of any hospitalization required to treat injuries he receives during the period of his freedom. In the event that he dies from such injuries then his estate is primarily liable for the cost of such hospitalization. If the hospital makes an affidavit that it is unable to recover its charges from the estate of the deceased prisoner, then the cost of the hospitalization may be paid by the county court of the county in which the prisoner was confined at the time of the escape and the injuries were received, by virtue of the provisions of Section 4235, R. S. Mo. 1939.

Respectfully submitted,

STEPHEN J. MILLETT Assistant Attorney General

APPROVED:

J. M. TAYLOR Attorney General

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CHIROPRACTORS:

When the State Board of Chiropratic Examiners revokes the license of a chiropractor for illegal actions or practices it does open the way for a branch of the state government, i.e. the prosecuting attorney of the county in which the chiropractor resides, to file criminal charges against the aforesaid chiropractor.

November 2, 1949

FILED 35

Mr. Vernon H. Grogan, D. C. Treasurer, State Board of Chiropractic Examiners 413a Court Street Fulton, Missouri

Dear Sir:

This office is in receipt of your recent request for an official opinion upon the following matter:

"Does the state board of chiropractic examiners open the way for any branch of the state government to file charges, find guilty and imprison when the license of a chiropractor is revoked for illegal actions or practices?"

In reference to this matter we would direct your attention to the following sections of the Laws of Missouri relating to the practice of chiropractics found in the Missouri Revised Statutes Annotated, 1939:

Section 10058.

"It shall be the duty of the board of chiropractic examiners to carefully investigate all charges of immoral or illegal actions of anyone to whom a license to practice chiropractic in this state has been issued. Upon complaint being made to the board it shall investigate and if it deems probable cause exists for the complaint, shall furnish a copy of the complaint to the accused by registered mail, together with a notice of the time and place for the hearing of same, which shall not be less than thirty days after the depositing of said communication in the United States mail. accused shall have an opportunity to be heard to answer such charges in person, or by attorney, and if upon such hearing it shall be proven beyond a reasonable doubt to the board, that the accused is guilty of such immoral or illegal action, or is addicted, or has been addicted, during a period of the past six months to the use of narcotics, drugs, or intoxicating liquors, or in any way guilty of deception or fraud in the practice of chiropractic, or of shielding anyone in immoral practices, criminal or illegal actions, or is guilty of any criminal or illegal actions, the board shall revoke his license.

Section 10059.

"The board shall have power to determine all matters herein placed within its jurisdiction and its determination shall be final and conclusive, except that such determination may be reviewed by the circuit court of the county in which the state board of examiners has its principal office, by writ of certiorari.

Section 10060.

"Any person who shall practice chiropractic or attempt to practice chiropractic, or who shall use the title of doctor of chiropractic, or any word, title, or letters, to induce belief that he or she is engaged in the practice of chiropractic, without first complying with the provisions of this chapter, or any person who shall buy, sell, or fraudulently obtain any diploma, or license to practice chiropractic, whether recorded or not recorded, shall be deemed guilty of a misdemeanor and upon conviction thereof, shall be fined not less than \$50.00, nor more than \$500.00, or be imprisoned in the county jail not less than thirty days, or more than one year, or both. It shall be the duty of the several prosecuting attorneys of this state to prosecute all persons charged with the violation of any provision of this chapter, and it shall be the duty of the secretary of the board, under the direction of said board, to aid said attorney of this state, in the enforcement of this chapter." (Underscoring ours.)

From the above it would be our opinion that when the state Board of Chiropractic Examiners revokes the license of a chiropractor for illegal actions or practices, that they do open the way for a branch of the state government, to-wit, the prosecuting attorney of the county in which the chiropractor whose license has been revoked resides, to file charges against the aforesaid chiropractor.

Of course, this action may be taken by the prosecuting attorney of the county in which the chiropractor resides independently of any action of the State Board of Chiropractic Examiners if complaint is made to him that the aforesaid chiropractic practitioner has violated a state criminal law. However, you will note that in that portion of the paragraph, quoted above and underscored by us, that after the State Board of Chiropractic Examiners has revoked the license of a practitioner for illegal actions or practices, that Section 10060, quoted above, makes it the duty of the prosecuting attorney of the county in which the aforesaid chiropractor resides to prosecute, and that it also makes it mandatory upon the secretary of the Board of Chiropractic Examiners to aid the prosecuting attorney in the prosecution. By assembling evidence leading up to the revoking of the license, which evidence is available to the prosecutor, the Board does open the way for the filing of criminal charges against the chiropractor whose license has been revoked.

CONCLUSION

It is the conclusion of this department that when the State Board of Chiropractic Examiners revokes the license of a chiropractor for illegal actions or practices, that it does open the way for a branch of the state government, i.e., the prosecuting attorney, to file criminal charges against the aforesaid chiropractor.

Respectfully submitted,

HUGH P. WILLIAMSON Assistant Attorney General

APPROVED:

J. E. TAYLOR Attorney General

HPW: mw

ADMINISTRATIVE LAW AND PROCEDURE: Rule of the State Board of Cos-STATE BOARD OF COSMETOLOGY: metology requiring a holder of

Rule of the State Board of Cosmetology requiring a holder of a Missouri license to pay a fee of \$5.00 for certification in order to become licensed in another state by reciprocity is invalid and beyond the power granted them by the Legislature.

November 17, 1949

Mrs. Lucile Gregory Executive Secretary State Board of Cosmetology Jefferson City, Missouri

Dear Mrs. Gregory:



I.

We received the following request for an opinion from you:

"Was the following rule, adopted by the State Board of Cosmetology, within their power and enforceable?

'Applicant holding current Missouri license applying for reciprocity in another state will be required to pay a clearing fee to the State Board of Cosmetology of Missouri. Fee--\$5.00.'"

II.

We understand this certification requires an examination of your records to determine the number of years the license holder has been licensed by the State of Missouri and that said person is in good standing at the time of the issuance of the certificate.

The State Board of Cosmetology was created for the purpose of licensing and registering all persons engaged in the practice of hair dressing, cosmetology and manicuring in this state.

Laws of Missouri, 1945, at page 738, Sections 1 and 4, provide as follows:

"Section 1. Authority for establishment of board--powers and duties.--There is hereby created and established a state board of

cosmetology for the purpose of licensing and registering all persons engaged in the practice of hairdressing, cosmetology and manicuring in this state, which board shall have such other powers and duties as have heretofore been vested in the state board of health as they relate to the practice of cosmetology, hairdressing and manicuring."

"Section 4. Powers of board.--The said state board of cosmetology is hereby authorized to conduct examinations of applicants for license to practice; to issue licenses and certificates of registration, to provide for the inspection of shops by licensed cosmetologists and to appoint the necessary inspectors therefor and to appoint examining assistants, if necessary."

Section 9814, Laws of Missouri, 1945, page 960, provides as follows:

"The control, supervision and enforcement of the terms and provisions of this article shall be under the State Board of Cosmetology."

The State Board of Health was not empowered to issue rules and regulations establishing a charge for any of its services or for the amount to be charged for any license issued by the State Board of Health. Therefore, the granting to the State Board of Cosmetology the powers and duties heretofore vested in the State Board of Health as they relate to the practice of cosmetology did not give the State Board of Cosmetology the power to make rules requiring the payment of any licenses or fees.

The Legislature has not granted to the State Board of Cosmetology the power to fix the amount of fees it may charge nor the amount to be charged for the various licenses it may issue. A careful study of the acts creating the State Board of Cosmetology and the laws regulating this profession clearly show that the Legislature has fixed the amount of the fees and licenses to be charged for all certificates and licenses issued by the State Board of Cosmetology. Such fees are fixed by Sections 9815 and 9821 (Laws of Mo. 1945, Page 959) and Section 9829 (Laws of Mo. 1947, page 321). It is true that Section 9813 allows the State Board of Cosmetology to set the amount of the annual registration fee for schools but places a limit of \$100.00 on such a fee.

The fact that the Legislature fixed the fees to be charged for all licenses and services by the State Board of Cosmetology shows

that they have not delegated their power to fix such charges to the State Board of Cosmetology.

The power to fix the amount of licenses to be charged by the state or any of its agencies is a legislative power.

42 Am. Jur., Section 36, Page 329, says:

"Legislative power is the power to make, alter, or repeal laws or rules for the future. To make a rule of conduct applicable to an individual who but for such action would be free from it is to legislate. * * *Administration has to do with the carrying of laws into effect, their practical application to current affairs by way of management and oversight including investigation, regulation, and control, in accordance with and in execution of the principles prescribed by the lawmaker."

In the case of Ex Parte Williams, 345 Mo. 1121; 139 S.W.(2d) 485, at page 1130 the court says:

"'A legislative body cannot delegate its authority, but alone must exercise its legislative functions. (12 C.J. 839; 6 R.C.L. 175.) It may empower certain officers, boards, and commissions to carry out in detail the legislative purposes and promulgate rules by which to put in force legislative regulations. It may provide a regulation in general terms, and may define certain areas within which certain regulations may be imposed and it may empower a board or a council to ascertain the facts as to whether an individual or property affected come within the general regulation or within the designated area.' (Cavanaugh v. Gerk, 313 Mo. 375, 280 S.W. 51, 1.c. 52.)"

42 Am. Jur., Section 53, at page 358, says:

"The scope and extent of the power of administrative authorities to enact rules and regulations is limited by the Federal and state Constitutions and the statutes granting them such power. In many cases the power to make rules and regulations on a particular subject is a limited power, having respect to mode and form and time and circumstance,

and not to substance. But in other cases the power is much more extensive and substantial and may be understood to give plenary control over those subjects. The rule of construction as to the extent of the power granted depends, at least in some sort, upon the nature of the subject matter. The extent of the power must be determined by the purpose of the act and the difficulties its execution might encounter. Since the power to make regulations is administrative in nature, legislation may not be enacted under the guise of its exercise by issuing a 'regulation' which is out of harmony with, or which alters, extends, or limits, the statute being administered, or which is inconsistent with the expression of the lawmakers' intent in other statutes. The administrative officer's power must be exercised within the framework of the provisions bestowing regulatory powers on him and the policy of the statute which he administers. He cannot initiate policy in the true sense, but must fundamentally pursue a policy predetermined by the same power from which he derives his authority. * * *"

Sutherland Statutory Construction, Section 6603, says:

"Administrative agencies are purely creatures of legislation without inherent or common-law powers. The general rule applied to statutes granting powers to administrative boards, agencies or tribunals is that only those powers are granted which are expressly or by necessary implication conferred, and the effect usually has to accomplish a rather strict interpretation against the exercise of the power claimed by the administrative body. The rule has been variously phrased, including language to the effect that a power must be 'plainly' expressed; that a power is not to be 'inferred' or taken by 'implication'; or that the jurisdiction of an administrative agency is not to be 'presumed.'"

We cannot find any statute enacted by the Missouri Legislature granting the power to the State Board of Cosmetology to issue or promulgate a rule requiring the payment of a clearing fee for certification by said Board of the holder of a Missouri license so that such licensee may apply for a cosmetology license in another state under reciprocity agreements. The Supreme Court of Missouri on October 3, 1949, in the case of Howell et al. v. Division of Employment Security, Department of Labor, 222 S.W.(2d) 953, held:

"* * *The decision of the Commission on March 10, 1944, that plaintiffs were subject to the payment of contributions was the same as levying a tax in the amount of the contributions required. The levying of a tax is a legislative function and may be exercised only when clear and express statutes have been enacted for that purpose. Such statutes operate in invitum and should be strictly construed. State ex rel. American Cent. Ins. Co. v. Gehner, 315 Mo. 1126, 280 S.W. 416. In the pungent words of Judge Lamm, in Leavel v. Blades, 237 Mo. 695, loc. cit. 700, 141 S.W. 893: 'When the tax gatherer puts his finger on the citizen, he must also put his finger on the law permitting it.' 61 C.J. p. 81, sec. 10; Am. Jur. p. 71, sec. 42, p. 74, sec. 44."

III.

CONCLUSION

The State Board of Cosmetology does not have power to promulgate a rule requiring the payment of a fee by holder of a Missouri license from said Board for certification of the records of said Board in regard to such license holder who wishes to apply for a license in another state and establish the fact that he or she has been licensed by the State of Missouri for a certain number of years and that the issuance of such a rule is beyond the power granted said Board by the Legislature and therefore the rule so adopted is invalid and nonenforceable.

Respectfully submitted,

APPROVED:

STEPHEN J. MILLET Assistant Attorney General

J. E. TAYLOR Attorney General AMENDING AND ICLES
OF ASSOCIATION:

the provisions of Art. 6, Chap. 37, R.S. 1939, may amend articles of incorporation as follows: "the corporation is specifically authorized to execute and guarantee any and all bonds and undertakings in judicial proceedings."

November 21, 1949

Honorable Thomas J. Guilfoil Chief Counsel Division of Insurance Dept. of Business & Administration Jefferson City, Missouri 11/22/49 FILED 35

Dear Mr. Guilfoil:

We have your recent letter requesting an opinion from this office. Your letter is substantially as follows:

"The sense of the amendment is to incorporate into Articles of Incorporation
the following language: 'and further
provided that this corporation is specifically authorized to execute and guarantee
any and all bonds and undertakings in
judicial proceedings.' Your opinion is
requested as to whether this amendment
and the proceedings in connection therewith comply with the laws of the State of
Missouri, and is not inconsistent with the
Constitution of the State of Missouri and
the Constitution of the United States.

"Your particular attention is directed to the question of the propriety of the extremely broad language used in the amendment. A question has been raised in this Division as to the meaning of an 'undertaking' in judicial proceedings. The company is incorporated under the provisions of Article 6, Chapter 37, R. S. Missouri, 1939."

Your letter requests the opinion of this department as to whether the proposed amendment and the proceedings in connection therewith comply with the law.

Article 6, Chapter 37, Section 5904, R. S. Mo. 1939, provides that insulance companies organized under said section

having a minimum of \$400,000.00 stock or capital assets may make insurance on all three classes of insurance therein provided, including insuring the fidelity of persons holding places of public or private trust.

Section 5906, R. S. Mo. 1939, provides that companies authorized to insure the fidelity of persons and having a minimum of \$200,000.00 paid up capital may become and be accepted as surety "on the bond, recognizance or other writing as a in or concerning any matter in which the giving of a bond or other obligation is authorized, required or permitted by the laws of the state."

The insurance company in question (Kansas City Fire and Marine), as you have informed us, meets the capital requirements of both sections.

We have examined the certified copies of the record minutes of the meetings of both the stockholders and the directors of said company, and find them to be regular and consistent with the law. It is also our opinion that the proposed amendment is authorized by Section 5904 and Section 5906, supra, and that the proposed amendment complies with the laws of the State of Missouri and is not inconsistent with the Constitution of Missouri or the Constitution of the United States.

CONCLUSION

It is the opinion of this office that an insurance company organized under Article 6, Chapter 37, R. S. Mo. 1939, which complies with the minimum capital and other requirements of Sections 5904 and 5906 of said chapter, may amend its charter by providing that "the corporation is specifically authorized to execute and guarantee any and all bonds and undertakings in judicial proceedings."

Respectfully submitted.

APPROVED:

H. JACKSON DANIEL Assistant Attorney General

J. E. TAYLOR Attorney General December 22, 1949

12/22/49

Hon. Thomas J. Guilfoil Counsel, Division of Insurance Jefferson City, Missouri



Dear Mr. Guilfoil:

This will acknowledge the transmission to this department of certified copies of the proceedings for an increase in the capital stock of the Commonwealth Life and Accident Insurance Company. We have examined the certified copies of the minutes of the special meeting of directors and of the stockholders, and find that they comply with the requirements of Section 6026, R. S. Mo. 1939.

We are further of the opinion that these proceedings comply with the statutes of Missouri and that such proceedings are not inconsistent with the Constitution of Missouri or the Constitution of the United States.

Respectfully submitted

H. JACKSON DANIEL

Assistant Attorney General

APPROVED:

J. E. TAYLOR ATTORNEY GENERAL

H.TD . A

90

MOTOR VEHICLES: Determination of weight carrying capacity of half-track motor vehicle.

February 7, 1949

FILED 37

Col. David Harrison Superintendent Missouri State Highway Patrol Jefferson City, Missouri

Dear Sir:

Reference is made to the inquiry submitted by your predecessor of your office to this department requesting an official opinion and reading as follows:

"The question has arisen as to the weight carrying capacity of a vehicle designed as a shovel and crane mounted on a half track truck. Attached is a photograph which will give you a better idea of the type of vehicle and the construction from which you may determine the weight carrying capacity. The weight of these vehicles is 18,700 pounds on the half track, and the question arises as to whether this driving assembly is a single axle or group of axles.

"Obviously, this will determine the allowable weight that can be carried on the vehicle, and we ask that you give us an opinion as to whether or not the half track is classed as a single axle or group of axles. The distance from the center of the front wheel to the center of the rear wheel of this group is four and one-half feet, and the width of the tread on each track is twelve inches. If the axles are not considered as a group, the maximum weight would be 18,000 pounds on a single axle, and the equipment could not be used on the highways, as without any added load its empty weight is 18,700 pounds or 700 pounds overweight on the axle. If it is considered as a group of axles the allowable weight would be determined by the formula (L / 40) x 650."

The photograph of the vehicle submitted along with the opinion request discloses that the front wheels are conventional in type bearing pneumatic rubber tires. The rear assembly on each side of the vehicle is a half-track with the weight being borne upon such track as distributed by four small wheels, the center to center distance between the front and rear axles of such wheels being four and one-half feet as mentioned in the letter.

Section 8406, Mo. R.S.A., reads in part as follows:

"No motor drawn or propelled vehicle, or combinations thereof, shall be moved or operated on the highways of this State when the gross weight thereof, in pounds shall exceed the weight computed by multiplying the distance in feet between the first and last axles of such vehicles or combinations of such vehicles plus forty (40) by seven hundred (700); nor shall the total gross weight, with load on any group of axles of a vehicle or combination of vehicles where the distance between the first and last axles of the group is eighteen (18) feet or less exceed the weight, in pounds computed by multiplying the distance in feet between the first and last axles of such group under consideration plus forty (40) by six hundred fifty (650). No vehicle or combination of vehicles shall be moved or operated on any highway in this State having a greater weight than sixteen thousand (16,000) pounds on one axle when the wheels attached to said axle are equipped with high pressure pneumatic, solid rubber or cushioned tires, and no vehicle or combination of vehicles shall be moved or operated on the highways of this state having a greater weight than eighteen thousand (18,000) pounds on one axle when the wheels attached to said axle are equipped with low pressure pneumatic tires, and no vehicle shall be moved or operated on the highways of this state having a load of over six hundred (600) pounds per inch width of tire upon any wheel concentrated on the surface of the

highway (said width in the case of rubber tires, both solid and pneumatic, to be measured between the flanges of the rim).

"For the purpose of this Section an 'Axle load' shall be defined as the total load imposed upon the highway through all wheels whose centers are included within two parallel transverse vertical planes not more than forty (40) inches apart."

The definition of "Axle load" contained in the section quoted seems to be applicable here. We reach this view by reason of the information given that the axles of the front and rear wheels of the rear assembly are four and one-half feet distant from each other. Examination of the photograph of the vehicle accompanying the opinion request discloses that in fact the weight of the rear portion of the vehicle is distributed over a bearing surface in contact with the roadway of some four and one-half feet parallel with the direction of travel and 12 inches in width parallel to the direction of the axles. In other words, a greatly enlarged bearing surface is used to carry the load than would be found in even four or six wheels equipped with pneumatic rubber tires of the conventional type.

CONCLUSION

In the premises, we are of the opinion that the rear wheels of the motor vehicle described in your letter of inquiry are to be treated as a group of axles rather than as a single one for the purpose of determining the maximum allowable weight limit which may be carried.

Respectfully submitted,

APPROVED:

WILL F. BERRY, JR. Assistant Attorney General

J. E. TAYLOR Attorney General

WFB:VLM

37

March 25, 1949



Col. David E. Harrison Superintendent Missouri State Highway Patrol Jefferson City, Missouri

Dear Sir:

We have received your request for an opinion of this department as to whether or not a factory built well drilling rig, using the same motor for drilling and for propelling the unit from one location to another, should be registered under the provisions of the Missouri Motor Vehicle Registration Laws.

Section 8367, R. S. Mo. 1939, re-enacted, Laws of 1945, page 1194, contains the following definitions of terms used in the Motor Vehicle Registration Law:

"'Motor vehicle.' Any self-propelled vehicle not operated exclusively upon tracks, except farm tractors.

"'Vehicle.' Any mechanical device on wheels, designed primarily for use on highways, except those propelled or drawn by human power, or those used exclusively on tracks."

(Emphasis applied.)

As can be seen, the statutory definition requires that a device must be "designed primarily for use on highways" in order to come within the Motor Vehicle Registration Act. The particular device about which you have inquired is designed primarily for use in drilling wells. The motor power used for that purpose is also used to propel the apparatus from one location to another. However, such use would be merely incidental to the primary purpose for which it was designed, to wit, the drilling of wells.

In the case of Keck v. Oklahoma Tax Commission, 188 Okla. 257, 108 P. (2d) 162, 164 (4), the court considered the question of whether or not scrapers designed for excavating and removing dirt in the construction of highways were subject to the Oklahoma Motor Vehicle License tax. The statutory definition of vehicle there involved is not identical with the Missouri definition, above quoted, although the court, in effect, applied the same text as that prescribed by the Missouri statute. In the course of its opinion the court said:

"By giving due consideration to all of the applicable provisions of the Act, we conclude that those vehicles which are not designed for use or used on the public highways of the State were not intended to be covered by the Act. The property involved herein is primarily used for excavation and construction work and the inconsequential and incidental use of the highways was not contemplated by the legislature in its imposition of a tax thereon for 'use of the public highways' * * *

We feel that the principle applied in the above case would be applicable in the situation that you have presented.

Conclusion.

Therefore, it is the opinion of this department that a well drilling rig which uses the same motor for drilling and for propelling the unit from one location to another is not a motor vehicle within the definition of Section 8367, R. S. Mo. 1939, re-enacted, Laws of 1945, page 1194, and such apparatus is not subject to the Motor Vehicle Registration Law.

Respectfully submitted,

APPROVED:

ROBERT R. WELBORN Assistant Attorney General

J. E. TAYLOR Attorney General

RRW:ml

SCHOOL DISTRICTS:

School districts adjacent to consolidated districts may move to join consolidated districts by petition.

March 31, 1949

Mr. Lane Harlan
Prosecuting Attorney
Boonville, Missouri

FILED 37

Dear Sir:

This office is in receipt of your recent request for an official opinion upon an issue which in your letter to us you framed thus:

"In April, 1913 Otterville Consolidated School District was formed under the present section 10495, R. S. Mo. 1939. Recently, there has been presented to C. A. Repp, Cooper County Superintendent of Schools a petition, in due form, signed by the requisite number of residents and, I assume, qualified voters of said consolidated school district. This petition seeks to include districts near, or adjacent to the present consolidated school district.

"The question presented is whether or not the consolidated school district can proceed under section 10495, after once having invoked the provisions of said section, or would any enlargement of said district have to be sought under the provisions of Section 10487a Mo. R.S.A., 1939?"

Section 10495, Mo. R.S.A. 1939, states:

"When the resident citizens of any community desire to form a consolidated district, a petition signed by at least twenty-five qualified voters of said community shall be filed with the county superintendent of public schools. On receipt of said petition, it shall be the duty of the county superintendent to visit said

community and investigate the needs of the community and determine the exact boundaries of the proposed consolidated district.* * *" (Underscoring ours.)

It seems obvious from the language of the above which is underscored, that this section is intended for use in the formation of a consolidated school district.

Section 10487a, Mo. R.S.A. 1939, states:

"Adjacent city, town or consolidated school districts, without limitations as to size or enrollment, or one or more of the above mentioned districts and one or more adjacent common school <u>districts</u> may be organized into a consolidated school district for the purpose of maintaining elementary schools and high schools. Elections for the purpose of perfecting such consolidation shall be called by the county superintendent of schools of the county wherein said districts lie, or jointly by two or more county superintendents if said districts lie in more than one county, on receipt of a petition signed by at least fifteen qualified voters from each district to be included in the proposed consolidation. * * *"

The language of the above section would clearly indicate that the framers of the statute contemplated that this section should be used when a school district, or districts, adjacent to a consolidated school district, desire to become a part of the consolidated district already existing. This is the situation which you set forth in your above quoted letter to us.

CONCLUSION

It is the conclusion of this department that when a school district, or districts, adjacent to a consolidated school district desire to become a part of the consolidated school district aforesaid that they should proceed in accordance with Section 10487a Mo. R. S. A. 1939.

Respectfully submitted,

APPROVED:

HUGH P. WILLIAMSON Assistant Attorney General

J. E. TAYLOR Attorney General

HPW:mw

HIGHWAY PATROL: Has authority to enforce regulations on privately owned and maintained roadways used by the public in general

May 17, 1949

Mr. David E. Harrison Superintendent, Missouri State Highway Patrol Jefferson City, Missouri FILED 37

Dear Sir:

Your opinion request of recent date reads as follows:

"We request an opinion from your department relative to the authority of the patrol to enforce traffic regulations on private roadways. The circumstances involved are as follows:

"The roadway leading from highway 54 just north of Bagnell Dam along the Osage River down to the base of the dam is owned and maintained by the Union Electric Company. However, this roadway is used by the public in general, and the patrol receives numerous calls concerning drunken driving obstructing traffic, careless and reckless driving and other violations. Mr. Bruce James, superintendent of the dam and an employee of the Union Electric Company requests that the patrol investigate all of the numerous complaints made on the people traveling this route.

"In the past, several arrests have been made, but the question has been raised as to the legality of the arrests due to the fact that the roadway was privately owned.

"We request your opinion as to whether or not the patrol has any authority in enforcing the regulations on this route. The roadway in question is privately owned and maintained. However, it is used by the public in general, which use we assume is with the consent of the owner. The first question to be determined is whether the statutory regulations of the motor vehicle laws extend to such roadways.

The motor vehicle laws sought to be enforced in this instance are valid exercises of the State's police power. This police power of the State extends not only to de jure public roadways, but also extends to de facto public roadways. This principle has recently been recognized in the case of State ex rel. Audrain County v. City of Mexico, 197 S.W.(2d) 301, 1.c. 304, 355 Mo. 612, from which we quote:

"As previously ruled in this State: The law of the road extends to all public highways, de jure or de facto, embracing ways on private property if used for public travel. The necessity for regulation inherent in the use permitted gives rise to and makes the police power applicable to private land when used as a de facto public highway. * * *

In the case of City of Clayton v. Nemours, 182 S.W.(2d) 57, 353 Mo. 61, where the City of Clayton, in the exercise of the police power delegated to it by the State, enacted a parking ordinance applicable to a private street used by the public, the court at 1.c. 60, said:

"In the instant case, sufficient for the purpose of this review, Glen Ridge avenue was devoted, although not dedicated, to the public use by acts of the owners. It was not taken over by the municipality. In so devoting the use of their property, the owners constituted Glen Ridge avenue a de facto although not a de jure public street within the meaning of statutory and ordinance provisions, the word public, when applied to highways, not being restricted to connote ownership alone but in proper instances being employed to describe the use. In determining whether a way is a public or private highway, the use to which the way is put; i.e., whether public or private, is of greater importance than its ownership, its mode of creation or its designation as public or private; because it would tend to create confusion and danger to the traveling public if privately owned highways open to and used by the general public

enforced their own rules of the road, free from legitimate public regulation, upon travelers leaving the publicly owned highways and entering upon the privately owned ways; for instance, a requirement of operation on the left hand side of the way et cetera. Consequently: 'The law of the road extends to all public highways, however created, and may also be applicable to roads not public highways, if used for travel.' 40 C.J.S., Highways, p. 246, Sec. 236, subsec. b. To the extent of the public interest thus created by the owners, they subjected Glen Ridge avenue to reasonable police regulations in the furtherance of the public safety, health, and welfare. * * *

It is therefore established that the regulations of the motor vehicle laws, as exercises of the police power of the State of Missouri, extend to privately owned and maintained roadways which are used by the public in general. There remains the question of whether or not the Missouri State Highway Patrol has been given the authority to enforce the regulations in question.

Section 8358, Laws Missouri 1945, p. 977, makes it the duty of the patrol to police and enforce the motor vehicle laws on highways constructed and maintained by the Commission. However, Section 8359, R. S. Mo. 1939, declares the members of the patrol to be officers of the State of Missouri with such powers as now or hereafter vest by law in peace officers except the serving and execution of civil process. Section 8359 reads, in part, as follows:

"The members of the patrol are hereby declared to be officers of the State of Missouri and shall be so deemed and taken in all courts having jurisdiction of offenses against the laws of this state. The members of the patrol shall have the powers now or hereafter vested by law in peace officers except the serving or execution of civil process. The members of the patrol shall have authority to arrest without writ, rule, order or process any person detected by him in the act of violating any law of the state.* * *"

Members of the patrol are also given the power and authority to make investigations connected with any crime of any nature. They may arrest anyone violating any law in their presence, and apprehend and arrest any fugitive from justice or any felony violation. This is provided for by Section 8358a, Laws Missouri 1943, p. 652, as follows:

"The members of the State Highway Patrol shall have full power and authority as now or hereafter vested by law in peace officers when working with and at the special request of the sheriff of any county, or the chief of police of any city, or under the direction of the superintendent of the State Highway Patrol, or in the arrest of anyone violating any law in their presence or in the apprehension and arrest of any fugitive from justice on any felony violation. The members of the State Highway Patrol shall have full power and authority to make investigations connected with any crime of any nature. * * * *

The regulations with which we are here concerned are found in Article I of Chapter 43, R. S. Mo. 1939. Vidations of these regulations are made either misdemeanors or felonies. Those regulations in this article, violations of which are not specifically made misdemeanors or felonies and punishment provided therefor, are governed by Section 8404(d) R. S. Mo. 1939, which reads:

"Any person who violates any of the other provisions of this article shall, upon conviction thereof, be punished by a fine of not less than five dollars (\$5.00) or more than five hundred dollars (\$500.00) or by imprisonment in the county jail for a term mot exceeding two years, or by both such fine and imprisonment."

Therefore, since these regulations extend to private roadways used by the public and since violations of these regulations are made crimes, the patrol has the power and authority to arrest on the roadway in question for any violation of these regulations committed in their presence. They have the power and authority to make investigations connected with any such violation, and where the violations constitute felonies they may apprehend and arrest the violations. In so doing they are enforcing these regulations as peace officers of the State.

CONCLUSION

It is, therefore, the opinion of this department that the highway patrol has the authority to enforce the regulations of the motor vehicle laws on a privately owned and maintained roadway which is open to the public in general, and has the power and authority as now or hereafter vests by law in peace officers to make arrests upon such roadway for violation of these regulations.

Respectfully submitted.

RICHARD H. VOSS Assistant Attorney General

APPROVED:

J. E. TAYLOR Attorney General

RHV:mw

MILITARY FORCES: Provision for compensation for members of Reserve Military Force does not apply to National Guard.

May 31, 1949

Brig. General John A. Harris Adjutant General Jefferson City, Missouri



Dear Sir:

We have received your request for an opinion of this department, which request is as follows:

"Inclosed herewith please find copy of a letter dated 2 May 1949 addressed to me by Brigadier General W. W. Kratz, Commanding General, 71st Fighter Wing, Missouri National Guard. Also please find inclosed a report on the accident mentioned in General Kratz's letter, and an opinion prepared by Lieutenant Colonel A. R. Troxell, JAGC, NGUS.

"For your further information, the writer brought this matter to the attention of the Military Council of Missouri at its regular quarterly meeting held on 7 May 1949, at which meeting this subject was discussed. The Military Council requested the Adjutant General to obtain an opinion from the Attorney General of Missouri on whether the Statutes of Missouri. as recorded in Laws of Missouri 1943, Page 647, Section 4; and in Laws of Missouri 1943, Section 15022.11, Chapter 121, Act. 1, Section 2, apply to members of the Missouri National Guard or whether these sections are applicable only to members of the Missouri Reserve Military Forces.

"Your cooperation in supplying this opinion will be very much appreciated."

The letter from Brig. General Kratz, to which you refer, concerns a fatal accident which occurred to Lt. Alan E. Bleist, a member of the Missouri National Guard. The accident occurred while he was participating in an aerial gunnery mission as a part of a scheduled training program.

Section 15019, R. S. Mo. 1939, provides that when the national guard is absent from the state in federal service the Governor shall have power to organize from the unorganized militia of the state a reserve military force for duty in this state. Pursuant to this statutory provision, an executive order was issued by the Governor of Missouri on September 10, 1940, calling upon the Adjutant General to organize a reserve protective force for duty within the state during the absence of the Missouri National Guard.

An act of the Legislature, found in Laws of 1943, page 644, Section 15022.1, Mo. R.S.A., required the reserve military force to be maintained in a state of preparedness with the same status of the national guard when on active duty under the provisions of Chapter 121, R. S. Mo. 1939.

Section 4 of an act, found in Laws of 1943, page 647, Section 15022.11, Mo. R.S.A., provided:

"During the period of emergency hereinafter set forth the following provision of law shall be in force pertaining to the Reserve Military Force of this State.

"Any member of the Reserve Military Force, who, while engaged in the performance of his lawfully ordered duties as a member of the Reserve Military Force, shall suffer injury or death or incur or contract any disability or disease, in the course of such duty, shall be entitled to receive such compensation therefor as may be determined by the Military Council of this State provided said member of his personal representative takes appropriate steps to enforce his claim hereunder prior to a date one year following the expiration of this Act. The Military Council shall have, and there is hereby vested fin it, full power and authority to adopt, promulgate, amend, and rescind all rules which it deems necessary or advisable in connection with the determination of such

claims. The compensation provided for hereunder shall not exceed Three Thousand Dollars (\$3000.00) on any one claim and shall be paid out of funds appropriated for the use of the Reserve Military Force. The decision of the Military Council shall be final in every case. The provisions hereof shall not be construed to give to any member of the Reserve Military Force a cause of action against the State of Missouri, but his right to compensation, if any, shall be governed solely hereby."

Section 7 of that act, Section 15022.14, Mo. R.S.A., provided, in part:

"The period of emergency referred to herein shall extend and this Act shall remain in full force and effect for a period from the date on which this Act becomes a law until twelve (12) months after the competent Federal authorities shall proclaim that the present state of war between the United States and Germany, Japan, and Italy has terminated unless sooner repealed. * * * "

Deactivation of the Reserve Military Force of Missouri was completed on March 31, 1947, and there is no longer in existence any active military organization known as such.

The above-quoted section, providing for compensation in the event of death, clearly refers only to members of the reserve military force. At the time of the adoption of that act that was a well-known and clearly definable organization. No mention is made in the act of members of the national guard. Therefore, there appears to be no way in which compensation could be paid under that section by reason of injury to or death of a member of that organization.

Conclusion.

Therefore, it is the opinion of this department that Section 4 of an act, found in Laws of 1943, page 647, Section 15022.11, Mo. R.S.A., providing for the payment of compensation for injury

or death to members of the reserve military force, does not apply to members of the Missouri National Guard.

Respectfully submitted,

ROBERT R. WELBORN Assistant Attorney General

APPROVED:

J. E. TAYLOR Attorney General

RRW:ml

HIGHWAY PATONL: MOTOR VEHICLES:

Patrol has no authority to make charge for supplying copies of accident reports to interested parties.

June 13, 1949

FILED 37

Mr. David E. Harrison, Superintendent Missouri State Highway Patrol Jefferson City, Missouri

Dear Sir:

We are in receipt of your recent request for an official opinion, which request reads as follows:

"This department contemplates making copies of accident reports for attorneys and other interested persons, but the materials and labor will involve some expense to the patrol. Therefore, we ask that you inform us whether or not it would be illegal for this department to make a charge not to exceed \$1.00 for copies of the reports.

"We realize the money collected would of necessity be turned in to the state treasurer, but we would like to inquire if it would be possible to ask that this be deposited to the State Highway Department Fund rather than in the General Revenue Fund."

There is no statutory authorization or requirement that the accident reports in question be made and filed. However, Section 8354, Laws Missouri 1943, p. 654, provides that the superintendent of the highway patrol shall "make all administrative rules and regulations # * * for the members of the patrol." Under this authority, Section 1 of the Rules and Regulations relating to Accident Reports was issued and promulgated. Section 1 provides that "every traffic accident involving a fatality, personal injury, or serious property damage, is to be investigated and Form SHP 2R prepared." This completed form, commonly known as the accident report, is kept on file by the patrol. It must first be determined whether or not these accident reports are matters of public record.

In the case of State ex rel. Kavanaugh v. Henderson, 169 S.W.(2d) 389, 350 Mo. 968, there was the question of whether copy invoices of liquor sales filed by liquor dealers with the supervisor of liquor

control pursuant to a regulation issued by the supervisor constituted public records. The court defined a public record at 1.c. 392:

"In all instances where, by law or regulation, a document is required to be filed in a public office, it is a public record and the public has a right to inspect it. 53 Corpus Juris, Section 1, Pages 604 and 605; Clement v. Graham, 78 Vt. 290, 63 A. 146. Ann. Cas. 1913E, 1208; Robinson v. Fishback, 175 Ind. 132, 93 N.E. 666, L.R.A. 1917B, 1179, Ann. Cas. 1913B, 1271; State ex rel. Eggers v. Brown, 345 Mo. 430, 134 S.W.(2d) 28.

"Section 4889, supra, also gives authority to the supervisor 'to make such other rules and regulations as are necessary and feasible for carrying out the provisions of this act, as are not inconsistent with this act.' Under this authority, the appellant's predecessor did promulgate Regulation No. 16, which did require liquor dealers to send the supervisor a copy invoice of liquor sales. As long as that Regulation was in effect, of course, they were public records and respondent was entitled to inspect them.

Accident reports of the same nature as those on file with the patrol were held in the case of People v. Harnett, 131 Misc. 75, 226 N.Y.S. 388 to be public records subject to inspection by persons showing therein an interest. These reports were filed with the Commissioner of Motor Vehicles pursuant to a statute requiring persons involved in automobile accidents to report the matter to the Commissioner upon forms provided therefor. It was contended that these accident reports were confidential in nature and therefore not subject to inspection. The court, however, held that inspection of the accident reports by persons having a proper interest therein would not be contrary to public policy, but would promote the public interest, providing stricter regulation in a dangerous field and also aiding in the determination of the truth, rather than suppressing it.

In view of the foregoing, we are of the opinion that the accident reports kept on file by the highway patrol are public records. It is fundamental law that persons interested therein have the right to inspect public records, which right also includes the right to make copies and memoranda therefrom. No fee may be charged for the exercise of this right of inspection, unless expressly provided for by statute. Therefore, the patrol must make the accident reports, as public records, available to parties interest therein, and no fee

may be charged for the exercise of this right of inspection.

The patrol is a state agency whose actions are proper only when done under authority expressly or impliedly conferred by statute, therefore, the patrol can act only in an official capacity. The charge not to exceed \$1.00 for copies of accident reports which the patrol contemplates supplying to interested parties would be a charge for the rendition of services by the patrol in its official capacity. As such, it would constitute a fee, as a fee is a charge made for the performance of official acts by a public office or officer.

It is well established that a fee may be charged for the rendition of services by a public official only when expressly provided for by statute. In the absence of a statutory provision therefor, the rendition of services is deemed to be gratutious; see Nodaway County v. Kidder, 129 S.W.(2d) 857, 344 Mo. 795. Since there is no statutory provision which allows the patrol a fee for supplying a copy of an accident report, the contemplated charge would not be within the province of the patrol's authority.

It should be noted that the patrol has no duty to supply copies of these accident reports to interested parties, as there is no statutory provision therefor.

CONCLUSION

Therefore, it is the opinion of this department that the accident reports kept on file by the highway patrol are public records, and as such, subject to inspection. However, the patrol has no authority to make a charge for supplying a copy of these accident reports to parties interested therein.

Respectfully submitted,

RICHARD H. VOSS Assistant Attorney General

APPROVED:

J. E. TAYLOR Attorney General

RHV:mw

SOLDIERS' BONUS:

Board of Review provided by Soldiers' Bonus Act still may pass upon applications for bonus.

July 19, 1949



Brig. General J. A. Harris, The Adjutant General, Jefferson City, Missouri

Attention: Leo B. Crabbs, Jr.

Dear Sir:

We have received your request for an opinion of this department, which request is as follows:

"Attached hereto is Claim No. 137905 of Abraham Holiby for Missouri Bonus paid to veterans of World War I. This claim was disallowed for lack of evidence that the claimant had resided in Missouri, as required by the Missouri Soldiers' Bonus Law.

"It is respectfully requested that your office render an opinion as to this claimant's eligibility for the bonus.

"It is further requested that your office furnish an opinion as to whether the Board of Review as set up originally in the Missouri Soldiers' Bonus Law has the right to function as such today. If not, does the law provide any means for a claimant whose application has been disallowed by the Bonus Commission or the Adjutant General, to appeal for a rehearing?

"While the time for filing claims expired December 31, 1947, House Bills 401 and 402, now on the informal calendar of the Senate, provide for an extension of time and an appropriation to pay claims."

Section 44b, Article 4, Constitution of 1875, adopted at a special election held August 2, 1921, provided for the payment of a bonus to residents of Missouri for service in World War I. Legislation enacted to implement the constitutional provision is found in Laws of 1921, 2d Ex. Sess., p. 6, Sec. 9577.1 - 9577.26 Mo. R.S.A.

The duty of passing upon applications was placed originally upon a Soldiers Bonus Commission of three members, with the provision that after May 1, 1923, all duties of the Commission should be performed by the adjutant general. Sec. 9577.9 Mo. R.S.A. Insofar as the adjutant general is required to determine whether or not the facts of a particular application show an applicant entitled to a bonus, such determination must be made by the adjutant general, and this department cannot pass upon the question where a purely factual matter is involved.

In the present case, the application of the claimant has been rejected because of his failure to furnish evidence of his residence in Missouri for a period of at least one year immediately prior to April 6, 1917. Such residence is required by the constitutional provision and Section 1 of the Soldiers' Bonus Act, cited above.

Determination of this matter is, under the circumstances of this case, determination of a question of fact, which must be made by the adjutant general, and we cannot, therefore, pass upon the question of whether or not the applicant is entitled to receive a bonus.

As for your second question, application for payment of bonus was originally required to have been made on or before Dec. 31, 1922. Section 9, Soldiers' Bonus Act, cited above. The time for making application has been extended from time to time, the last extension being found in Laws of 1945, p. 1756, and reading as follows:

"It shall be the duty of the adjutantgeneral to determine as expeditiously as possible the persons who are entitled to the payments under this act and to make such payments in the manner herein prescribed. Applications for such payments shall be filed with the adjutant-general on or before December 31, 1947, and at such place or places as the adjutant-

general may designate and upon blanks furnished by the adjutant-general: Provided further, the adjutant-general shall have the power to adopt all proper rules and regulations not inconsistent herewith to carry into effect the provisions of this act; and provided further, that all officers of the state or any county and any city or town therein are hereby directed to furnish free of charge, in writing, any information that the records in his office may disclose relative to the identity, place and period of residence and the war service of any soldier claiming a payment under this act whenever such information is required by the adjutantgeneral of any person making an application for such bonus or any part thereof; and any application for bonus heretofore filed and rejected may be filed before the adjutantgeneral and by him again heard; and if it appears that the rejection of the claim was erroneous, the rejection may be set aside, and the claim allowed and paid; and provided further, that no department of the state government shall employ any clerks for the purpose of carrying out the provisions of this act, except the adjutant-general shall employ an examiner of soldier bonus claims and one stenographer for the handling of claims."

Provision was made by Section 10 of the Soldiers' Bonus Act (Sec. 9577.11 Mo. R.S.A.) for appeal, in the event of rejection of an application, within sixty days after such rejection, to a board of review, consisting of the Governor, Attorney-General and Secretary of State.

In the present situation, the application was first rejected on April 8, 1925. It was reconsidered in May 1931, and again rejected. There is no record of an appeal to the board of review on either of these occasions. On June 11, 1949, the applicant again wrote the adjutant general, requesting reconsideration of his application.

Under the last enactment, quoted above, providing for extension of time for filing of applications, the final date by which application was required to be made was Dec. 31, 1947. The act also provided that "any application for bonus filed and rejected may be filed before the adjutant general and by him heard again." We feel that any such application for reconsideration would also be subject to the time limit for filing of Dec. 31, 1947.

The rejection by the adjutant general of any application, whether an original application or one for reconsideration, filed on or before such date, would, we feel, continue to be subject to review by the board of review in accordance with the provisions of Section 10, supra. The act has not been repealed and would, we feel, remain in effect so long as applications might be considered by the adjutant general.

In the present case, the application for reconsideration was not made prior to Dec. 31, 1947, as required by law. Therefore, we feel that no right of appeal presently exists as to the application for reconsideration made on June 11, 1949. Nor is there any provision for rehearing before the adjutant general, except in accordance with the above quoted statute, which, as set out above, we feel must have been requested before Dec. 31, 1947.

As you have pointed out, there is now pending on the informal calendar of the Senate House Bill No. 402, providing for another extension of time for filing applications to Dec. 31, 1952. Should this bill be enacted into law, the applicant would be entitled to re-file his application, and, upon rejection, assuming that no other change is made in the law, would have a right to appeal to the board of review.

CONCLUSION

Therefore, it is the opinion of this department that, where the question of whether or not a person is entitled to receive a bonus for the State of Missouri for military service in World War I depends upon the determination of a matter of fact, that determination must be made by the adjutant general, and cannot be made by this department. We are further of the opinion that final rejection by the adjutant general of any application for a bonus or of any re-filed application of a previously rejected application, is subject to review by the board of review as provided in Section 10 of the Soldiers' Bonus Act, but that the application or re-filing must have been made prior to Dec. 31, 1947, unless further extension of time for such filing is provided.

Respectfully submitted,

ROBERT R. WELBORN Assistant Attorney General

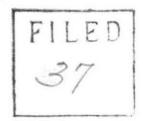
APPROVED:

J. E. TAYLOR ATTORNEY GENERAL MOTOR VEHICLES: Automobile dealer who takes assignment in blank HIGHWAY PATROL: of title may not fill in name as assignee of his transferee.

July 29, 1949

8/23/49

Col. David E. Harrison Superintendent Missouri State Highway Patrol Jefferson City, Missouri



Dear Sir:

This is in answer to your letter of recent date requesting an official opinion of this office, reading in part as follows:

"It has been called to the attention of this department that a number of automobile dealers are not completing the endorsement on Certificates of Title on all automobiles which they handle.

"In some cases where an automobile is purchased from a private individual, either through cash or trade, the dealer will merely ask the previous owner to sign in the proper place on the back of the certificate. The remainder of the information is not completed and upon resale of the car to another owner by the dealer, the assignment is so made up as to indicate that the car passed from one private owner to another and the name of the dealer does not enter into the transaction.

"Some of the prosecuting attorneys have placed different interpretations upon Section 8382 of the Motor Vehicle Law and the opinion of your department is requested as to whether the transaction as described above is in compliance with this section of law."

Subsection (d) of Section 8382, Mo. R. S. A., found Laws of Missouri, 1947, page 389, reads in part as follows:

" * * * In the event of a sale or transfer of ownership of a motor vehicle or trailer for which a certificate of ownership has been issued the holder of such certificate shall endorse on the same an assignment thereof, with warranty of title in form printed thereon, and prescribed by the Director of Revenue, with a statement of all liens or encumbrances on said motor vehicle or trailer, and deliver the same to the buyer at the time of the delivery to him of said motor vehicle or trailer. The buyer shall then present such certificate, assigned as aforesaid, to the Director of Revenue, at the time of making application for the registration of such motor vehicle or trailer, whereupon a new certificate of ownership shall be issued to the buyer, the fee therefor being \$1.00. If such motor vehicle or trailer is sold to a resident of another state or country, or if such motor vehicle or trailer is destroyed or dismantled the owner thereof shall immediately notify the Director of Revenue. Certificates when so signed and returned to the Director of Revenue shall be retained by the Director of Revenue and all certificates shall be appropriately indexed so that at all times it will be possible for him to expeditiously trace the ownership of the motor vehicle or trailer designated therein. It shall be unlawful for any person to buy or sell in this state any motor vehicle or trailer registered under the laws of this state, unless at the time of the delivery thereof, there shall pass between the parties such certificate of ownership with an assignment thereof, as herein provided, and the sale of any motor vehicle or trailer registered under the laws of this state, without the assignment of such certificate of ownership, shall be fraudulent and void. * * * "

As provided for by this section, every transfer of ownership of a motor vehicle or trailer for which a certificate of ownership has been issued must be accompanied by a transfer of such certificate and an assignment thereof. The assignment must be by the transferror to his transferee. In the case presented, the transferror merely completes the assignment in blank, unacknowledged, which assignment is retained by the transferee dealer, who later enters therein as assignee the name of the purchaser of the motor vehicle from said dealer. The only authority which the dealer has is to complete the assignment by filling in his own name. Filling in the name of any other person would be a violation of subsection (d) of Section 8382, supra.

In the case of Pearl vs. Interstate Securities Co., 357 Mo. 160, 206 S.W. (2d) 975, the plaintiff, a used-car dealer, purchased two used cars. The assignment of ownership of each was signed by the owner, but no name of a transferee was written therein nor was either assignment acknowledged. At 1.c. 978, the court said:

"Plaintiff did obtain the title certificates with assignments thereon signed by each owner at the time the cars described therein were delivered to him as Section 8382 required. However, plaintiff did not fully comply with the statute because he did not have the assignment of the certificates to him by the holders completed in the form prescribed by the Commissioner which included an acknowledgment before a notary. He had only an unacknowledged assignment, and this was not sufficient to vest the legal title in him. Although he was a notary he had no authority to take an acknowledgment on an assignment to himself as he said he intended to do. 1 Am. Jur. 334-335, Sections 52-53; 1 C.J.S. Acknowledgements, Sections 52-53. Nor would he or anyone else have had the right to fill in the name of Security as assignee from the holders because he was the buyer and Section 8382 required the assignment to be made to him. To do so would be a misdemeanor. Sec. 8404(d), R. S. 1939, Mo. R.S.A. Nevertheless, he had implied authority to fill in his own name because it was the intention of the parties that the same be made to him. National Bond & Investment Co. v. Mound City Finance Co., Mo. App., 161 S.W. 2d 664. Since a notary would not always be immediately available when an agreement for a sale is made, surely the buyer should have a reasonable time to complete the assignment by obtaining the seller's acknowledgment."

Therefore, the transferee who takes an assignment in blank of a certificate of ownership not only has no right to insert therein the name of any other party than himself, but to do so would also constitute a misdemeanor under subsection (d) of Section 8404, R. S. Mo. 1939, which subsection reads as follows:

"(d) Any person who violates any of the other provisions of this article shall, upon conviction thereof, be punished by a fine of not less than five dollars (\$5.00) or more than five hundred dollars (\$500.00) or by imprisonment in the county jail for a term not exceeding two year, or by both such fine and imprisonment."

CONCLUSION

Therefore, it is the opinion of this department that an automobile dealer who takes an assignment in blank of a certificate of ownership at the time of a transfer of an automobile to him, and later fills in as assignee the name of the person to whom he transfers said automobile, violates subsection (d) of Section 8382, Mo. R. S. A., Laws of Missouri, 1947, Volume I, page 389, and is guilty of a misdemeanor as provided for in subsection (d) of Section 8404, R. S. Mo. 1939.

Respectfully submitted,

RICHARD H. VOSS Assistant Attorney General

APPROVED:

J. E. TAYLOR Attorney General

RHV:VLM

MOTOR VEHICLES) Patrol cannot change safety glass standard, and must approve all types conforming with Sec. 8391, R. S. Mo. 1939.

September 24, 1949

19/14/49

Honorable David E. Harrison Superintendent, Missouri State Highway Patrol Jefferson City, Missouri



Dear Sir:

We are in receipt of your recent request for an opinion which reads as follows:

"Section 8392 of the Motor Vehicle Code reads as follows.

"The State Highway Patrol shall maintain a list of approved types of glass which conform to the requirements of Section 8391 and shall furnish a copy of such list to the Director of Revenue and thereafter shall keep the Director of Revenue informed as to any changes in or additions to such list."

"Section 8391 defines safety glass as follows.

"The term "safety glass," as used in sections 8389, 8390, and 8392 shall be construed as meaning glass so treated or combined with other materials as to reduce, in comparison with ordinary sheet glass or plate glass, the likelihood of injury to persons by objects from external sources or by glass when the glass is cracked or broken."

"There is a doubt in our mind as to what authority we have under this section so far as establishing specifications that glazing material must meet before it can be termed 'safety glass' as defined in Section 8391. In other words, does the State Highway Patrol have the authority to require safety glass or glazing material to meet certain standards or must it approve any product manufactured when the manufacturers term it as safety glass. We feel that the statute has no meaning unless it carries with it the authority to establish standards.

"Attached is a copy of the American Standard Safety Code for Safety Glass for Glazing Motor Vehicles Operating on Land Highways. This code is followed by the manufacturers of such glazing material, and it is the standard which this department would like to adopt as a criteria for approval of glass used in motor vehicles operated within this state.

"We would also like to know, should this department have authority to establish such standards if it would be necessary to file with the Secretary of State a copy of the code as established in order that we might comply with Section XVI Article IV of the constitution."

Section 8392b, Laws of Missouri, 1945, page 1201, reads as follows:

"It shall be the duty of the Director of Revenue to refuse to issue a license for any motor vehicle manufactured or assembled after January 1, 1936 unless such motor vehicle is equipped as provided in Sections 8389, 8390 and 8391, Revised Statutes of Missouri, 1939, with such types of 'safety glass' as have been heretofore approved by the Secretary of State or may hereafter be approved by the State Highway Patrol."

(Underscoring ours.)

Prior to the enactment of this section, it was the duty of the Secretary of State to approve the various types of "safety glass." It is now made the duty of the State Highway Patrol to perform this function. Section 8392, Laws of Missouri, 1945, page 1200, provides that:

"The State Highway Patrol shall maintain a list of approved types of glass which conform to the requirement of Section 8391 and shall furnish a copy of such list to the Director of Revenue and thereafter shall keep the Director of Revenue informed as to any changes in or additions to such list."

Therefore, it is expressly provided that the types of glass to be approved are those "which conform to the requirement of Section 8391." The Legislature has provided the standard to be used by the Patrol, and the Patrol has no authority to establish specifications or set up a standard other than that provided by Section 8391, supra. Should the Patrol do so, its action would in effect be an attempt to amend Section 8391, which is of course clearly not within the power of an administrative body. A Veterans Administration regulation was held invalid for this very reason in the case of Miller v. United States, 294 U.S. 435, in which case the Director was expressly given the power to make regulations to carry out the purposes of the act. At l.c. 439, the Court said:

"It is invalid because not within the authority conferred by the statute upon the Director (or his successor, the Administrator) to make regulations to carry out the purposes of the act. It is not, in the sense of the statute, a regulation at all, but legislation. The effect of the statute in force at the time of the adoption of the so-called regulation is that in respect to compensation allowances, loss of a hand and an eye shall be deemed total permanent disability as a matter of law. There being no such provision with respect to cases of insurance, the question whether a loss of that character or any other specific disability constitutes total permanent disability is left to be determined as matter of fact. The vice of the regulation, therefore, is that it assumes to convert what in the view of the statute is a question of fact requiring proof into a conclusive presumption

which dispenses with proof and precludes dispute. This is beyond administrative power. The only authority conferred, or which could be conferred, by the statute is to make regulations to carry out the purposes of the act - not to amend it."

CONCLUSION.

Therefore, it is the opinion of this department that the State Highway Patrol must approve all types of safety glass which conform to the requirement of Section 8391, R.S. Missouri, 1939, and that the Patrol has no authority to establish other specifications or a new standard which conflicts or changes the requirement of Section 8391, supra.

Respectfully submitted,

RICHARD H. VOSS Assistant Attorney General

APPROVED:

J. E. TAYLOR Attorney General

RHV: few

SCHEATS) Unclaimed money in hands of sheriff arising from-partition sales to be paid into State Treasury upon order of the circuit court.

December 23.

Honorable Lane Harlan Prosecuting Attorney Cooper County Boonville, Missouri



Dear Sir:

Reference is made to your request for an official opinion of this office, reading as follows:

"Re: Section 642.8 R. S. Mo. Ann. 1939

"Our Sheriff has three accounts in his file which are escheat accounts, and all of which accrued before the expiration of his first term in office, at which time he made his final settlement, and is now starting on his second term. He wants to get rid of the money, but under the above section in question the statute provides that the action shall be brought by the attorney-general of the State of Missouri in the name and at the relation of the State of Missouri. Would an interpretation by your office of this statute allow me to bring this action as prosecuting attorney, or would the papers have to be prepared by your office?

"The Sheriff is rather anxious to dispose of this money and any information you can give me regarding the procedure will be greatly appreciated."

You have further informed us that two of such accounts represent unclaimed proceeds arising from the sale of land in partition, and that the third represents the proceeds of the sale of unclaimed or confiscated personal property. We do not find any statute escheating the latter type of money to the state, and, therefore, have disregarded this account in the preparation of the opinion.

You have referred to Section 642.8, Missouri R.S.A. Examination of this section discloses that it appears as part of an act found

Laws of 1947, Volume I, page 297. This entire act is directed toward the escheat of moneys arising by reason of litigation concerning rates, refunds, refunds of premiums, fares and charges collected for services rendered in Missouri or in connection with contracts of insurance. It provides a scheme for the determination of the fact of such escheat, but is limited in its scope to matters such as those enumerated above, and is inapplicable to accounts such as those you have inquired about.

Your attention is directed to Section 620, R. S. Missouri, 1939, which insofar as pertinent to the subject matter of your inquiry reads as follows:

" * * * or, if upon final report of any sheriff to the court, it is shown that the interests in the proceeds of the sale of land in partition of certain parties, who are absent from the state, who are non-residents, who are not known or named in the proceedings, or who, from any cause, are not in a situation to receive the same, are in his hands unpaid and unclaimed; * * * in each and every such instance such real and personal estate shall escheat and vest in the state, subject to and in accordance with the provisions of this chapter."

The "court" referred to in the above quoted portion of the statute necessarily refers to the circuit court as jurisdiction of suits in partition is vested in such court under the provisions of Article II of Chapter 8, R. S. Missouri, 1939. Included therein are Sections 1753 and 1754, respectively, providing for the report by the sheriff of the sale in partition and the direction by the court to the sheriff to distribute the proceeds to the parties entitled thereto in accordance with their respective interests.

Section 621, R. S. Missouri, 1939, reads as follows:

"Within one year after the final settlement of any executor or administrator, assignee, sheriff or receiver, all moneys in his hands unpaid or unclaimed, as provided in section 620, shall, upon the order of the court in which such settlement is made, be paid into the state treasury. And the state treasurer shall issue to him a duplicate receipt therefor, one of which shall be filed with the state auditor, who shall credit him with the amount thereof and charge the state treasurer therewith. All such moneys so received into the state treasury shall be credited into a fund, to be known and designated as 'escheats.'"

Considering this latter statute in connection with those previously quoted, it seems that the procedure to be followed by the
sheriff upon ascertaining that the rightful claimants to the proceeds of a sale in partition are unknown, unavailable, or have not
made claim to their share of such proceeds is to inform the circuit
court of such fact. Thereupon, such court will enter the order
mentioned in Section 621, R. S. Missouri, 1939, requiring the payment of such portion of the proceeds into the State Treasury. The
receipt of the State Treasurer is, under the statute mentioned, a
complete discharge of the sheriff with respect to such funds. This
is necessary inasmuch as Section 1751, R. S. Missouri, 1939, renders
the sheriff and his sureties liable upon his official bond for all
moneys collected upon such sales being made.

CONCLUSION.

In the premises we are of the opinion that upon determination being made by a sheriff of the nonresidence or failure to claim their share of the proceeds of a sale in partition by the parties rightfully entitled thereto, as determined by the judgment of the court in the original partition action, such sheriff should thereupon inform the circuit court of such facts. Thereafter, upon the order of the circuit court, such sheriff may pay such money into the State Treasury and the receipt of the State Treasurer therefor will serve as a complete discharge of the liability of the sheriff under his official bond to account for such money.

Respectfully submitted,

APPROVED:

WILL F. BERRY, JR. Assistant Attorney General

J. E. TAYLOR Attorney General WP

WFB/feh

LIQUOR: State of Missouri cannot prevent s. pment of liquor from out-of-state distillers direct to officers' clubs located on military reservations.

September 19, 1949

9/28/49

Mr. Covell R. Hewitt Supervisor, Dept. of Liquor Control State Office Building Jefferson City, Missouri



Dear Mr. Hewitt:

We have your recent letter, which reads as follows:

"Please let me have your official opinion on the following question:

"May a distiller located outside the State of Missouri make shipments of intoxicating liquor direct to Officers' Clubs located on military reservations in the State of Missouri. Members of these Officers' Clubs contend that they are an instrumentality of the Federal Government and as such the Missouri Department of Liquor Control has no jurisdiction over intoxicating liquors consigned to said Officers' Clubs.

"Such clubs are permitted to operate without a license from the Supervisor of Liquor Control, however, they have been required to purchase all intoxicating liquors from duly licensed Missouri Wholesalers."

The first question is the correctness of the contention that such officers' clubs are federal instrumentalities. In U. S. et al. v. Query et al., 37 Fed. Supp. 972, where the issue was the power of a state to tax an Army Post Exchange for selling beer, the language below was found:

"We are of the opinion that the provisions of the state (taxing) statute are not applicable to the activities of the Post Exchange, and that the order to enforce, and

the threats to enforce, constituted an interference with the activities of the United States and are unconstitutional. The President of the United States, the heads of the various departments of the United States, to whose opinions the courts always give great weight, including the attorney general, the secretary of war, and the commissioner of internal revenue, have in many instances held that Post Exchanges and their predecessors were federal instrumentalities. This court holds and declares that the findings herein and the conclusion reached apply to all of the aforementioned Post Exchanges, ship's stores and officer's clubs."

Thus, it is clear that officers' clubs, like post exchanges, ship's stores, etc., are federal instrumentalities. But the extent of their immunity from state laws in general, and the liquor laws in particular, requires further explanation and investigation. Hence, the next question to be determined is: Does the State of Missouri, through the Department of Liquor Control, have jurisdiction over federal military reservations located within its borders?

Clause 17, Section 8, Article 1 of the Constitution of the United States provides as follows:

"To exercise exclusive legislation, in all cases whatsoever, over such district * * * as may, by cession of particular States, and the acceptance of Congress, become the seat of government of the United States, and to execute like authority over all places purchased by the consent of the legislature of the State in which the same shall be, for the erection of forts, magazines, arsenals, dock yards, and other needful buildings; * * *"

In the Laws of Missouri, 1943, page 628, the lands on which are located Camp Crowder, Fort Leonard Wood, St. Louis Ordnance, St. Louis Medical Depot, and several others (see Section 3, page 629), are ceded as follows:

"Exclusive jurisdiction in and over said lands so acquired by the United States shall be, and the same is hereby, ceded to the United States for all purposes, saving and reserving, however, to the State of Missouri the right of taxation to the same extent and in the same manner as if this cession had not been made; and further saving and reserving to the State of Missouri the right to serve thereon any civil or criminal process issued under the authority of the State, in any action on account of rights acquired, obligations incurred, or crimes committed in said State, but outside the boundaries of such lands. * * *

In Fort Leavenworth R. R. Co. v. Lowe, 114 U. S. 525, the court summed up the jurisdictional effect of a cession as follows:

"When the United States acquires lands within a state by purchase, with the consent of the state legislature, for the erection of forts, magazines, arsenals, dock yards and other buildings, it has exclusive jurisdiction of the tract."

Similarly, in Yellow Cab Transit Co. v. Johnson, 48 Fed. Supp. 594, 597:

"Thus when the state recognizes the existing federal jurisdiction, or cedes, by legislative act, exclusive jurisdiction to the federal government over such lands, except such as it specifically reserves to itself, such act of cession establishes and limits that jurisdiction."

Also, In re Annexation of Reno Quartermaster Depot, 180 Okla. 274:

"Article I, Section 8 of the United States Constitution confers exclusive jurisdiction upon Congress to legislate in respect to military reservations and similar instrumentalities of the federal government, and the general school laws of this state can have no application to the military reservations located within the state."

And, in Collins v. Yosemite Park Co., 304 U. S. 518:

"That whatever the status of jurisdiction existing at the time of their enactment these acts of cession and acceptance are to be taken as declaration of the agreements reached by the respective sovereignties, state and national, as to the future jurisdiction and rights of each in the entire area of Yosemite National Park. Distinguished from the right to tax, the right to regulate the sale and use of alcoholic beverages was not reserved by the state and such regulations are not enforceable in the park. This reservation does not authorize the state to exact, for the sale or importation of alcoholic beverages in the park, the fees for licenses which are provided by Section 5."

We have now seen that officers' clubs are federal instrumentalities, hence immune to state control; that these officers'
clubs are located on federal military reservations which, in
the absence of a specific reservation in the act of cession,
are under the exclusive jurisdiction of the federal government.
One question then remains to be answered. May a distiller located outside the State of Missouri make shipments directly to
these officers' clubs?

In the case of Yellow Cab Transit Co. v. Johnson, id., the facts were these: The officer's club at Fort Sill, Oklahoma, ordered, through its secretary, a large assortment of liquor to be shipped to the club from Illinois; the law of Oklahoma at the time forbade shipment of liquor into the state without a permit; the state seized the liquor, resulting in this lawsuit. Excerpts from the decision in the case are set out below:

"Applying this rule, the shipment originating in East St. Louis, Illinois, and destined for Fort Sill, was in interstate commerce and would not become subject to state regulation until delivery at its destination.

"From these decisions and the language used therein and the interpretation given by the Supreme Court of the United States of such enactments, it is plain that exclusive jurisdiction over Fort Sill is in

the United States, except for the specific reservation to serve civil and criminal process, and certain taxes, thus putting that area beyond the field of operation of its (the state's) laws, unless the jurisdiction was widened or extended over the reservation by the Twenty-First Amendment.

"The Twenty-First Amendment did not confer upon a State the power to regulate the importation of intoxicating liquors into territory over which it has ceded to the United States exclusive jurisdiction.

"The writer of this opinion may have his personal views with reference to the general policy of permitting the use of intoxicants within military reservations within so-called 'dry states,' however, the law has been declared by the Supreme Court of the United States.

"The issues must be determined in favor of the plaintiff. A mandatory injunction will issue directing defendants to return the shipment in question to plaintiff for delivery to its original destination."

It is thus conclusively established, by the above and many other federal cases, that states have no jurisdiction in the area of federal military reservations, other than that specifically reserved in the acts of cession. It is equally apparent by reading the Missouri acts of cession that no power to regulate the sale, importation or use of alcoholic beverages on federal military reservations located in this state has been reserved.

This office has previously held that the Liquor Control Act does not apply to federal military reservations. See opinion of January 18, 1940, addressed to Hon. Walker Pierce, Supervisor of Liquor Control, a copy of which is attached.

In Crater Lake National Park Co. v. Oregon Liquor Control Commission, 26 Fed. Supp. 363, the court held that the Oregon Liquor Control Act is inapplicable to Crater Lake area, which was ceded by the state and accepted by the federal government:

"It is also alleged that the defendants (Liquor Control Commission) threatened to

interrupt any attempts to bring beer and other alcoholic beverages into Crater Lake Park for resale there, whether from points within or without the state. * * * Should the State's commission persist in its avowed purpose of interfering with the transportation into the Park of beer and wines for consumption therein, reconsideration of the necessity for injunctive relief may then be warranted."

Conclusion.

It is the opinion of this office that officers' clubs on military reservations in the State of Missouri as instrumentalities of the federal government are not subject to the jurisdiction of the State of Missouri, except as specifically reserved by the act of cession. The Department of Liquor Control has no jurisdiction over the sale of liquor by such officers' clubs or the purchase by them of liquor from sources outside of the State of Missouri. However, the transportation of liquor within the state is subject to the laws regulating such transportation, even though the destination of the shipment is on a military reservation.

Respectfully submitted,

H. JACKSON DANIEL Assistant Attorney General

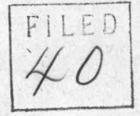
APPROVED:

J. E. TAYLOR Attorney General

HJD:ml Enc. ROADS: MAINTENANCE: There is no duty imposed upon land owners abutting on a county road to remove growth and underbrush on the right-of-way.

January 28, 1949

2-1-49



Mr. Roger Hibbard Prosecuting Attorney Marion County Hannibal, Missouri

Dear Mr. Hibbard:

This office is in receipt of your recent inquiry as to whether there is any duty on owners of land abutting on a county road to remove and clear growth and underbrush on the road itself, that is, upon the right-of-way. We note that Marion county operates under a county highway commission system.

Section 8504, Laws of Missouri, 1945, states: "It shall be the duty of the county highway commission and said commission shall have the power to locate, lay out, designate, construct and maintain, subject to approval of the state highway commission, a system of county highways * * *."

Section 8508, R. S. Mo. 1939, states:

"The county highway commission shall have absolute jurisdiction and control over all highways constituting a part of the county highway system, and shall hold title in fee to the right-of-way thereof, and no other officer, board or commission, except as in this article specifically provided, shall have or exercise any authority or jurisdiction over any of such highways. The roads constituting the county highway system shall be known and designated as 'county highways.'"

Section 8579, R. S. Mo. 1939, states:

"The county highway engineer and overseers shall protect all fruit, shade and ornamental trees along the sides of the public roads, and shall forthwith remove all signs and advertisements whatsoever that may have been nailed or fastened to any of said trees. And it shall be the duty of the county highway engineer to

see that this provision is enforced."

From the above we conclude that responsibility for maintenance of the right-of-way of county roads in counties operating under a county highway commission rests solely upon the aforesaid commission.

The only duty imposed upon the owners of land abutting upon county roads is set forth in Section 8578, R. S. Mo. 1939, which duty is that every person owning a hedge fence situated along or near the right-of-way of any public road shall between the first days of May and August of each year cut the same down to a height of not more than five feet.

CONCLUSION

It is the opinion of this office that there is no duty imposed upon the owners of land abutting upon a county road to remove and clear growth and underbrush on the right-of-way of the road.

Respectfully submitted,

HUGH P. WILLIAMSON Assistant Attorney General

APPROVED:

J. E. TAYLOR Attorney General

HPW:mw

COLLECTOR: TAXATION: County Collectors not authorized to compromise penalties for nonpayment of merchant's tax; penalty collected should be turned in to the county.

February 16, 1949

Hon. Wilson D. Hill Prosecuting Attorney Ray County Richmond, Missouri



Dear Sir:

This is in reply to your request for an opinion from this office, which reads as follows:

"The County Collector of this county, a Third Class County, has a few delinquent merchant taxes, which have not been paid at this date.

"He has Bond signed by the merchants with sufficient sureties to insure payment of these taxes by December 31, 1948.

"Under Section 11315 and the provisions of these Bonds, they are now forfeited and double the amount could be sought.

"If the merchants at this date, wish to come in and pay the Collector the amount of the tax, plus interest, should the Collector demand double the amount of the bond as a penalty?

"If he demands and collects double the amount of the bond as penalty is he authorized to retain the excess penalty?"

Section 11315, Mo. R. S. A., reads as follows:

"Every person, corporation or copartnership of persons, to whom a license shall have been granted to vend goods, wares and merchandise, who has filed a correct statement as herein required, and failed to pay the amount of revenue so owing to the collector of the proper county, shall be deemed to have forfeited the bond given by him or them in virtue hereof, and judgment shall be rendered for the plaintiff in damages, for double the amount of such revenue and costs."

In 51 Am. Jur., Section 998, page 871, the rule is stated as follows:

"The tax collector's duties in the collection and enforcement of taxes are ministerial in character and are to be discharged with promptness and fidelity.

* * *"

The collection of taxes is a ministerial act. (Louisville Water Company V. Commonwealth, 89 Ky. 244, 12 S. W. 300). In the case of State v. Welsch, 124 S. W. (2d) 636, the St. Louis Court of Appeals, in defining a ministerial act, stated, 1.c. 639:

" * * * A ministerial act, as applied to a public officer, is an act or thing which he is required to perform by direction of legal authority upon a given state of facts being shown to exist, regardless of his own opinion as to the propriety or impropriety of doing the act in the particular case. State ex rel. Jones et al. v. Cook, 174 Mo. 100, 118,119, 120, 73 S. W. 489."

The statutes requiring bond for merchant's license tax, prescribing form of bond and providing double, triple and quadruple penalties as well as provisions for suit to collect them, first appearing in Revised Statutes, 1855, Chapter 110, pages 1072-1078, have been contained to this time in almost identical language.

In your opinion request you state that some of the merchants did not pay a merchant's tax due for 1948 on or before the 31st day of December. Section 11315, supra, declares in clear and unequivocal language that such person "shall be deemed to have forfeited the bond given by him or them in virtue hereof, and judgment shall be rendered for the plaintiff in damages, for double the amount of such revenue and costs."

In the case of American Surety Co. v. Hamrick Mills, 191 S.C. 362, 4 S. E. (2d) 308, 124 A. L. R. 1147, the court said, 1.c. 1153:

"The Statute fixes the amount of the penalty (the indebtedness), and to this extent is self executing, and the mere fact that some officer has not performed his ministerial duty thereabout cannot affect the existance of the debt. The passage of time, when the tax has not been paid, automatically attaches and increases the debt in the amount or to the extent of the penalty provided by the pertinent statute. * * *"

In the case of State v. Central Pacific R. R. Co., 9 Nev. 79, the court considered the question of the powers of the Board of County Commissioners to compromise and settle suits instituted by the state for the collection of taxes. Concerning this, the court said, 1.c. 88:

"2. Did the board of county commissioners have any authority to make the compromise with defendant? It is not claimed that there is any law expressly giving to the commissioners power to compromise and settle suits instituted by the State for the collection of delinquent taxes. But it is argued by defendant's **zcounsel that section 8, subdivision 12, of the Statutes of 1864-5, p. 259, giving to the commissioners power to 'control the prosecution or defense of all suits to which the county is a party;' and sec. 29 of the Statutes of 1871, p. 94, providing that 'no suit

for the collection of delinquent taxes shall be commenced except by the direction of said board, 'imply that it was the intention of the legislature to invest the commissioners with full power to control the collection of taxes, and 'that when the process of collection has taken the form * * * of an action at law, the county commissioners have control of such action.' This position is wholly untenable.

"The board of county commissioners is an inferior tribunal of special and limited jurisdiction. It must affirmatively appear that the action of the board in compromising with defendant was in conformity to some provision of the statute giving to it that power, else its order was without authority of law and void. State v. Commissioners of Washoe County, 5 Nev. 319; Swift v. Commissioners of Ormsby County, 6 Nev. 97; Hess v. Commissioners of Washoe County, 6 Nev. 108; White v. Conover, 5 Blackford, 463; Rosenthal v. M. & I. Plankroad Company, 10 Ind. 361; City of Lowell v. Commissioners of Middlesex, 3 Allen, 550; Finch v. Tehama County, 29 Cal. 455."

In Brown v. Kirby, 4 Ky. Law Rep. 446, the rule was stated by the court as follows:

"Sheriff is the agent of the State and county in the collection of revenues. His duty is to collect money for taxes, and he can not make any commutation so as to affect the State or county."

In the case of City of Louisville v. Louisville Ry. Co., 63 S. W. 14, the court, while considering the question of the authority of a city attorney to compromise claims for taxes, stated,, 1.c. 19:

" * * * Likewise, we are of opinion that the city attorney could not effect a compromise and take less than is shown to be due from the taxpayer, neither before nor after suit brought. City of Louisville v. Bank of Kentucky, 174 U. S. 412, 19 Sup. Ct. 881, 43L. Ed. 1027. His powers and duties are fixed by the charter provision, and when the delinquent taxes come to him for collection the matter must be adjusted by a judgment, unless the full amount be paid."

In view of the above authorities, we believe that the collector is without the authority to accept payment of the merchant's tax which was due on or before December 31, 1948, without also exacting double the amount in damages. The passage of time automatically attaches and increases the debt in the amount or to the extent of the penalty provided by the pertinent statute, and it becomes the duty of the collector, under the provisions of Section 11318, Mo. R. S. A., to institute suit without delay upon the bond forfeited, against the principal and all sureties, jointly or severally, as may be deemed advisable. The sections providing for forfeiture of the bond given by merchants to insure payment of the tax may seem to be harsh, but as stated in the case of Western Union Tel. Co. v. State, 44 N. E. 793, 1.c. 796:

"Appellant makes particular complaint of the 50 per cent. penalty provided for in suits under the statute. What we have said as to the nature of appellant's property, and the difficulty in coercing payment of delinquest taxes due thereon, will fully answer this objection. In the sale and redemption of other forms of property in case of delinquency there is often quite as heavy a penalty imposed before the property is finally relieved from the paramount tax lien. By section 56 of the general tax law (section 8466, Rev. St. 1894), the county auditor is required to add 50 percent. to the valuation in case the property owner has refused to list his property or subscribe to the oaths required. The validity of a similar penalty was upheld in Boyer v. Jones, 14 Ind. 354. Other like penalties and heavy charges are imposed in different sections of the tax law, where the property holder

Mas been neglectful or otherwise at fault in matters relating to the assessment or payment of his taxes. See numerous provisions of the tax law as to penalties, costs of redemption, etc., resulting from failure to pay taxes when due. Sections 150-225 of the general tax law of 1891 (sections 8568-8643, Rev. St. 1894). In the event that one is called upon to pay a tax which he believes to be illegal, he has two courses open to him: He may resist payment at the hazard of all penalties in case the decision shall be against him, or he may pay the tax under protest, and then, in case the decision is in his favor, demand the return of his money. See Chemical Works v. Ray (R. I.) 34 Atl. 814, No one need pay any penalty except through his own wrongful act. The government is in need of its revenues, and these revenues will be paid promptly by all good citizens. In case of failure to comply with such duty, such penalties will be imposed as will, in the judgment of the law-making power, best compel compliance with the law in each case, to the end that all the property owners of the state may bear their equal share of the public burden. Such penalties, as we have seen, are never imposed upon those that pay their taxes when due; the imposition of the penalty being an effort on the part of the lawmakers to compel good citizenship on the part of all taxpayers, that none may shirk the common duty. The validity of the penalty here complained of has, besides, been already affirmed by this court in the case of State v. Adams Exp. Co., 144 Ind. --, 42 N. E. 483."

In answer to the second question, that is, is a collector authorized to retain the excess penalty, we refer you to the case of Nodaway County v. Kidder, 129 S. W. (2d) 857, which states the general rule concerning compensation of public officers for official duties as follows, 1.c.860:

"The general rule is that the rendition of services by a public officer is deemed to be gratuitous, unless a compensation

therefor is provided by statute. If the statute provides compensation in a particular mode or manner, then the officer is confined to that manner and is entitled to no other or further compensation or to any different mode of securing same. Such statutes, too must be strictly construed as against the officer. State ex rel. Evans v. Gordon, 245 Mo. 12, 28, 149 S. W. 638; King v. Riverland Levee Dist., 218 Mo. App. 490, 493, 279 S.W. 195, 196; State ex rel. Wedeking v. McCracken, 60 Mo. App. 650, 656.

"It is well established that a public officer claiming compensation for official duties performed must point out the statute authorizing such payment. State ex rel. Buder v. Hackmann, 305 Mo. 342, 265 S.W. 532, 534; State ex rel. Linn County v. Adams, 172 Mo. 1, 7, 72 S.W. 655; Williams v. Chariton County, 85 Mo. 645."

We are unable to find any statute which provides that the collector may retain the amount of the penalty provided by Section 11315, supra, and following the rule in the Kidder case, supra, the penalty money must be accounted for by the collector.

Conclusion

It is the opinion of this department that collectors do not have the authority to compromise the penalty which accrues by virtue of the nonpayment of merchant's taxes on or before December 31, but must demand double the amount of the bond as a penalty. The collector is not authorized to retain the penalty which becomes due by virtue of such nonpayment.

Respectfully submitted,

JOHN R. BATY Assistant Attorney General

APPROVED:

J. E. TAYLOR Attorney General

JRB:ml

DIVISION OF WELFARE STATE TREASURER Certified copy of checks issued to old age assistance recipients competent, evidence.

May 24, 1949

5/25

Mr. Haskell Holman Chief Clerk State Treasurer's Office Jefferson City, Missouri



Dear Sir:

This will acknowled a receipt of your request for an opinion which reads:

"It is requested that you advise this Department in a written coinion whether or not it is possible to furnish either the original canceled checks or photostats thereof either to other state agencies or to individuals; and, if so, please advise under what circumstances this would be possible."

It is the writer's understanding that you desire this opinion by not later than Thursday of this week and that the immediate question involves only such original canceled checks that might be requested by the Division of Welfare to be used by said Division as evidence in court, in proceedings instituted by said Division to recover money from the estate of deceased recipients of old age assistance. Therefore in view of the time element involved, we shall only attempt herein to answer the question relative to the use of canceled checks by the Division of Welfare. However if you desire an opinion on the original request, kindly advise us and we will render same.

There is no specific provision in the Social Security Act relative to what records might be considered compotent evidence in such cases.

We are of the opinion that a much better policy, if we may say so, may be pursued which would be just as effective and thereby prevent the possibility of loss or destruction of such original records. We suggest that you follow the provision of Section 1824, No. R.S.A. 1939, which provides that copies of all papers and documents

lawfully deposited in the office of the State Treasurer when properly certified to and the official seal affixed thereto shall be received in evidence in the same manner and effect as the original. Section 1824, supra, reads:

"Copies of all papers and documents lawfully deposited in the office either of the treasurer or auditor of the state, when certified by such officer and authenticated by the seal of office, shall be received in evidence in the same manner and with the like effect as the originals."

In view of the foregoing section, the furnishing of a properly certified copy of a canceled check with official seal affixed thereto to be used as evidence, will be as effective as if the original check was introduced in evidence and at the same time it would avoid the possibility of any loss or damage of the original record on file in your office.

Therefore, we respectfully recommend that when any original paper or document on file in your office is requested for the purpose of using same as evidence in some court in this state, that you furnish a certified copy of same as provided in Section 1824, Mo. R.S.A. 1939.

Respectfully submitted,

AUBREY R. HAMMETT, JR. Assistant Attorney General

APPROVED:

J. E. TAYLOR ATTORNEY GENERAL

ARH:nm

STATE TREASURER

RECORDS

Who may inspect and obtain certified copies of records in the Office of State Treasurer.

EVIDENCE

July 1, 1949



Mr. Haskell Holman Chief Clerk Office of State Treasurer Jefferson City, Missouri

Dear Sir:

This will acknowledge receipt of your request for an opinion which reads:

"This is to acknowledge receipt of your opinion dated May 24, 1949.

"I wish to thank you for the information contained in such opinion; however, it is also requested that you furnish this Department with a written opinion covering all canceled checks at your earliest convenience."

The writer in discussing this request with you subsequent to receipt of same concludes that what you are trying to determine now is what, if any, records or canceled checks in the Office of the State Treasurer of the State of Missouri are confidential, and if any and everyone may examine same or obtain the original for use as evidence or obtain a certified copy of same for such purposes.

A careful search of the law in this state relative to such records reveals only one statute which requires such records in the office of the State Treasurer to be confidential and that is Section 9444a, Mo. R.S.A. relative to applications and records concerning an applicant for old age assistance. While this particular statute is a part of the Social Security Act, it is specifically directed to any employee or officer in the State of Missouri and makes it unlawful for such persons to use for any purpose or to divulge or make known in any manner to any person, any information obtained by them in the discharge of their official duties relative to the identity of an applicant or

recipient or the amount of assistance received by any recipient. There is one exception contained in the above statute and that pertains to proceedings where the right of the applicant to receive assistance or the amount received or to be received by any recipient is called into question. The same statute does authorize persons directly connected with the administration of said act in the performance of their official duties, applicants, recipients or their attorneys, to inspect such records.

Section 9414a reads:

"All applications and records concerning any applicant for, or recipient of old age assistance shall be confidential and shall be open to inspection only to persons directly connected with the administration of this Act in the performance of their official duties, applicants for, or recipients of assistance or their attorneys. It shall be unlawful for any officer or employee of the State of Missouri to use for any purpose or to divulge or make known in any manner whatever to any person any information obtained by them in the discharge of their official duties, relative to the identity of applicants or recipients of old age assistance or the amount of assistance any recipient receives, except in proceedings where the right of applicants to receive assistance or the amount received or to be received by any recipient is called into question.

"Anyone violating any of the provisions of this act shall be guilty of a misdemeanor."

Your request apparently is directed principally at persons desiring original canceled checks filed in your office or certified copies of same, for use as evidence in proceedings instituted and pending in the courts or before some administrative agency of the state.

Our search discloses that all warrants allowed on account against the State of Missouri or grants, salaries paid and expenses, must be certified to by the comptroller and forwarded to the State Auditor for his approval. Upon approval the warrant is then transferred to the State Treasurer for payment. (See Sections 11008.36, 11008.43a

and 11008.44, Mo. R.S.A.) We are assuming for the sake of this opinion that these canceled warrants finally issued by the State Treasurer are the particular records which you now inquire if same may be inspected or placed in the custody of any individual not an employee of the State Treasurer to be used as evidence or may such individuals obtain certified copies of same for such purposes.

Under Sec. 645, Mo. R.S.A., the Legislature has declared that the common law rule in this state is still in full force and effect except where same may be repugnant to the Constitution of the United States, state, or any act of the legislature. Of course, if the State Legislature has made an exception thereto, such is shown by passage of Section 9414a supra, then such an enactment prevails in that particular instance only and the common law rule applies to all not contained in said exception.

A public record has been well defined in People v. Hartnet, 226 N.Y.S., l.c. 341, wherein the court said:

"* * * A public record strictly speaking is one made by a public officer in pursuance of a duty, the immediate purpose of which is to disseminate information to the public or to serve as a memorial of official transactions for public reference. * * *"

In State v. Henderson, 169 S.W. (2d) 389, 1.c. 392, the respondent therein had been making copies of records found in the Department of Liquor Control of the State of Missouri and she had been selling such information to liquor dealers. The Liquor Control Act no where specifically made any records in that department confidential. The Supreme Court in holding that certain records are public records and open for inspection by the public, said:

"In all instances where, by law or regulation, a document is required to be filed in a public office, it is a public record and the public has a right to inspect it. 53 Corpus Juris, Section 1, Pages 604 and 605; Clement v. Graham, 78 Vt. 290, 63 A. 146. Ann.Cas. 1913E, 1208; Robison v. Fishback, 175 Ind. 132, 93 N.E. 666, L.R.A. 1917B, 1179, Ann.Cas. 1913B, 1271; State ex rel. Eggers v. Brown, 345 Mo. 430, 134 S.W. 2d 28.

"Section 4889, supra, also gives authority to the supervisor 'to make such other rules

and regulations as are necessary and feasible for carrying out the provisions of this act, as are not inconsistent with this act.' Under this authority, the appellant's predecessor did promulgate Regulation No. 16, which did require liquor dealers to send the supervisor a copy invoice of liquor sales. As long as that Regulation was in effect, of course, they were public records and respondent was entitled to inspect them. This is not now disputed by the appellant."

In view of the foregoing there can be no question as to what constitutes a public record and in fact nearly all records filed in your office are public records.

The common law rule relative to who may inspect public records has been well stated in Vol. 45, Am. Jur., pp. 427-428, Section 17, which reads in part:

"There is authority to the effect that according to the English common law there is no right in all persons to inspect public documents or records. It is, however, to be noted that the English courts have seldom been called upon to enforce a private individual's right to inspect public documents and records except where the inspection was desired to secure evidence in a pending or prospective suit. Accordingly, there was formulated the following common-law doctrine: Every person is entitled to the inspection, either personally or by his agent, of public records, including legislative, executive, and judicial records, provided he has an interest therein which is such as would enable him to maintain or defend an action for which the document or record sought can furnish evidence or necessary information. This rule, it is said, is not so much a denial of the right of every citizen to inspect the public records and documents as a declaration of the interest which a private individual must have to avail himself of the extraordinary writ of mandamus

to enforce his right. In theory the right is absolute, yet in practice it is so limited by the remedy necessary for its enforcement that it can be denominated only a 'qualified right.'

The existence of a suit is not, however, a sine qua non for the exercise of the right."

(Also See Vol. 3, C. J., Sec. 40, page 624).

Therefore we must conclude in view of the foregoing that all public records filed in your office and not made confidential by statute may be inspected at any reasonable time by any person having an interest in same. However, this does not apply to canceled checks issued to recipients of old age assistance, except in such proceedings where the right of the applicant to receive assistance or the amount received by any recipient is called into question. Of course at all times applicants and attorneys and persons connected with the administration of old age assistance may inspect such records.

There are other canceled checks and records that are made confidential under the statutes such as benefit checks issued by the Division of Employment Security under the Department of Labor and Industrial Relations, however, such checks do not clear through the State Treasurer, neither are they in the custody of the State Treasurer and therefore we need not consider them herein. There are some canceled warrants from that department for purchases, salaries and expenses, filed in your department, however, we think the statute hereinabove referred to relative to confidential records of that department does not include such canceled warrants and purchases, salaries and expenses but relates solely to benefits and records pertaining thereto.

Furthermore, we find no authority for the State Treasurer placing any canceled checks or other records of his department in the custody of someone not in any manner associated with his department to be used as evidence in any proceedings before some court, board, commission or referee. We do find statutes providing that certified copies of records in said office are admissible in evidence and should have the same force and effect as if the original record were produced in evidence. (See Sections 1821 and 1824, Mo. R.S.A.) Applying that well established rule of statutory construction that the inclusion of one thing is to exclude all others, we believe it was the legislative intent that original records in the office of the State Treasurer should not be loaned to anyone for use as evidence, but that the Legislature in providing a simple and effective means whereby certified copies of such records may

be introduced in evidence, excluded the possibility of the use of original records. Of course, this does not prevent the issuance by the court of a subpoena duces tecum to the State Treasurer to produce certain records in his office on a date certain, however, in such case those records will be in the custody of the State Treasurer or his agent and not a stranger to the department.

CONCLUSION

Therefore it is the opinion of this department that with the exception of canceled checks of recipients of old age assistance and other records pertaining to identity and amount of grants to such recipients, all records in the Office of the State Treasurer may be inspected at reasonable times by any person interested as provided under the common law rule hereinabove enumerated by text writers and the courts. Furthermore, that recipients of old age assistance, their attorneys and employees of the state in the administration of old age assistance may inspect canceled checks of recipients and records pertaining to the administration of old age assistance on file in your office; that at no time are you authorized in placing original records on file in your department, in custody of persons not employed therein, for use as evidence in courts or before administrative agencies of this state. However, this does not mean that you shall not comply with a subpoena duces tecum issued by the court or authorized agency to produce certain records in your custody. Furthermore, that persons interested or desiring such records on file in your office for use as evidence may obtain certified copies of same, except those pertaining to old age assistance as provided in Sections 1821 and 1824, Mo. R.S.A. which certified copies shall have the same force and effect as original records.

Respectfully submitted,

AUBREY R. HAMMETT, JR. Assistant Attorney General

APPROVED:

J. E. TAYLOR ATTORNEY GENERAL

SCHOOLS: Duties of county and township collectors and treasurers under Senate Bill No. 307, Laws of Missouri, 1947, page 370.

September 20, 1949

Honorable W. H. Holmes State Auditor State Capitol Building Jefferson City, Missouri FILED 41 9/26/49

Dear Sir:

This department is in receipt of your recent request for an official opinion which reads as follows:

"In reorganized school districts, each unit comprising the reorganized district has for the year 1949, and prior years levied school taxes as independent units. Also, the County Treasurer has in his hands funds belonging to each unit comprising the reorganized district, broken down as to funds (teachers, incidental, etc.)

"The questions are:

- "(1) Should the collector of revenue in his monthly turnover of tax collections to the treasurer of the reorganized districts, report the amount collected in each district comprising the reorganized district, or report the collections for all the districts in a lump sum?
- "(2) Should the county treasurer in making the transfer of the funds in his hands to the treasurer of the reorganized district, submit a statement of the amount to the credit of each district, broken down as to funds (teachers, incidental, etc.) or report the total amount in a lump sum for all districts and all funds?
- "(3) Would the board of directors of the reorganized district have authority to reallocate the moneys received from the county treasurer and county collector to the teacher's fund and incidental fund, according to the needs determined by them, or should the

moneys be placed to the credit of the funds in accordance with the tax levies fixed by each unit comprising the reorganized district?"

The questions submitted in the foregoing request for an opinion will be considered in the order in which they have been stated, and the term "reorganized school district" as used in the request will be construed to mean a reorganization accomplished pursuant to a law enacted by the 64th General Assembly of Missouri, being Senate Bill No. 307, found in Laws of Missouri, 1947, Volume II, page 370.

No provision contained in Senate Bill No. 307, supra, contains any directive to the county and township collectors relative to monthly turnover of tax collections to treasurers of reorganized districts. Section 10 of the new reorganization law does provide, in part, that " * * * the directors above provided shall be governed by the laws applicable to six director school districts." The special law applicable to six director school districts is to be found in Article 5 of Chapter 72, R. S. Mo. 1939, and therein we find that county and township collectors are directed to make a monthly turnover of school moneys collected direct to the treasurer of the board of education.

Section 10482, Article 5, Chapter 72, R. S. Mo. 1939, provides as follows:

"The county or township collector shall pay over to the treasurer of said board of education all moneys received and collected by him to which said board is entitled at least once in every month; and upon such payment he shall take duplicate receipts from said treasurer, one of which he shall file with the secretary of said board of education, and the other shall be filed in his settlement with the county court."

The foregoing section does nothing more than require the monthly turnover of school tax moneys to the treasurer of the board of education and requires the collector to take duplicate receipts for such moneys. This particular section is to be followed by county and township collectors in making a monthly turnover of school tax moneys to treasurers of reorganized school districts formed pursuant to Senate Bill No. 307, supra.

However, in enacting the current school reorganization law just referred to, the Legislature did not formulate a rule to guide county and township collectors in making monthly turnovers of school tax moneys assessed, levied and collected in each of the several component school districts making up the reorganized district. It cannot be reasonably contended that it was imperative for the Legislature to state such a rule, in view of the duty imposed on county and township collectors to make a monthly turnover of moneys to treasurers of school districts entitled to such money, and when we further consider the type of receipt collectors are required to give, relative to school taxes, when they receive tax books from a county clerk.

Section 10398, Article 2, Chapter 72, R. S. Mo. 1939, provides:

"It shall be the duty of the county clerk to take a receipt from the county collector for the school taxes by him placed on the general tax books; and the collector shall proceed to collect the same in like manner as the state and county taxes are or may be collected, and he shall receive, as full compensation for his services on the amount collected and paid over by him, the same per cent as is allowed by law to collectors for collecting other taxes; and he shall pay over monthly, to the county treasurer, all such taxes collected and take his receipt therefor."

The foregoing section requires a county clerk to take a receipt from the county collector for school taxes placed on the general tax books. School taxes are assessed, levied and extended on the tax books for each individual school district -no two school districts being required to have corresponding levies within the maximum limitations. The only sound rule for collectors to follow in reporting monthly collections of school taxes to treasurers of reorganized districts is to make their report reflect what was actually accomplished, to-wit: the collection of school tax moneys as the same were assessed and levied. Consequently, county and township collectors of revenue in their monthly turnover of tax collections to treasurers of school districts reorganized pursuant to authority contained in Senate Bill No. 307, supra, should report the amount collected in each district forming a component part of the reorganized district so long as each component district has assessed a school tax therein for subsequent levy and collection and the same has not been subjected to revision by the reorganized and enlarged district before such original levy was acted upon. If the reorganized district has withdrawn the estimates filed by the component districts and filed a new estimate, of course the report of the collector shall show only the amount of the different funds for the entire reorganized district.

We next consider whether the county and township treasurers, in making the transfer of funds in their hands to the treasurer of the reorganized district, should submit a statement of the amount to the credit of each district forming a part of the reorganized district, broken down as to funds (teachers, incidental, etc.) or report the total amount in a lump sum for all districts and all funds.

Section 11 of Senate Bill No. 307, Laws of Missouri, 1947, Volume II, page 376, provides:

"The terms of office of all school directors and officers of the various school districts comprising the territory incorporated in such enlarged school districts shall cease upon the adoption of the plan of reorganization and the organization of the board of directors, and such officers shall deliver to the board of directors of the enlarged school district all property, records, books and papers belonging to such component districts. All funds in the hands of the county or township treasurer to the credit of the various districts composing such enlarged district, shall be immediately transferred to the credit of the treasurer of such enlarged district. If any former six-director district shall be merged in any enlarged district, as provided herein, the treasurer of such former six-director district shall immediately turn over to the treasurer of such enlarged district, all funds belonging to such former six-director district, and shall make settlement therefor as provided by Section 10480, Revised Statutes of Missouri, 1939: Provided, that the directors of such enlarged district shall faithfully perform all existing contracts and legal obligations of the component districts."

In the foregoing quoted Section 11 of Senate Bill No. 307, supra, treasurers of former six director districts which become a part of a reorganized district are given positive directions as to the type of settlement they are to make when making a turnover of funds in their hands at the time reorganization is effected, but no rule is laid down in this section to guide county and township treasurers in making any particular type of settlement which will account for the turnover of moneys in

their hands at the time of reorganization. In formulating a rule in this regard, we state that the rule must require the county and township treasurers to make a report sufficiently comprehensive in its terms and disclosures to fully acquaint the treasurer of the reorganized district with all facts touching prior receipts and disbursements of funds in the hands of such treasurers.

Section 10347, R. S. Mo. 1939, reenacted, Laws of Missouri, 1945, page 1629, and found in the law applicable to all classes of schools, provides:

"The board of directors of each school district shall, on or before the fifteenth day of May of each year, forward to the County Superintendent of Schools an estimate of the amount of money to be raised by taxation for the ensuing school year, and the rate required to produce said amount, specifying by funds the amount and rate necessary to sustain the school or schools of the district for the time required by law or authorized by the qualified voters of the district, to meet principal and interest payments on the bonded debt of the district, and to provide such funds as may have been ordered by the qualified voters of the district for other legitimate district purposes, including the purchase of school building sites, buying or erecting school buildings, repairing and furnishing such buildings, and providing foot bridges across running streams."

It will be noted that this statute just quoted provides that the estimate required to be filed on or before May 15 of each year by each school district must not only disclose the estimated amount of money to be raised by taxation for the ensuing year, but must include the rate required to produce such an amount, specifying by funds the amount and rate necessary to sustain the school for the period authorized. On the basis of such an estimate, school taxes are assessed, levied, collected and disbursed. To require a county or township treasurer, in making a turnover of all funds in their hands to the credit of the various districts composing the reorganized district, to do less than submit a statement of the amount to the credit of each district, broken down as to funds (teachers, incidental, etc.), would be to ignore sound accounting procedures

and would in no way disclose a true and accurate statement of accounts by such treasurers. This conclusion is necessary to harmonize the enactment under consideration, Senate Bill No. 307, supra, with the many germane clauses of Missouri's school law.

At this point we pass to the third question submitted in the opinion request and seek to ascertain the authority of the board of directors of the reorganized and enlarged district to reallocate moneys, received from county and township treasurers and county and township collectors, to the teachers' fund and incidental fund, according to the needs determined by such board of directors. This question may be resolved by referring to Section 10366, R. S. Mo. 1939, reenacted, Laws of Missouri, 1943, page 893, which provides, in part, as follows:

"All school moneys received by a school district shall be disbursed only for the purposes for which they were levied, collected or received. * * * "

The statute just referred to is a positive directive touching the application of school moneys and constitutes a rule which can only yield to the exceptions contained in the statute and with which we are not compelled to deal in disposing of the question at hand. In this instance we are only dealing with the right of the board of directors of the recorganized and enlarged school district to reallocate moneys coming into their treasury by virtue of the reorganization and consolidation affected pursuant to authority contained in Senate Bill No. 307, supra, such moneys having previously lawfully been allocated by separate school districts comprising the enlarged district. The statute in question has previously been construed by the Supreme Court of Missouri in the case of Russell et al. vs. Frank et al., 348 Mo. 533, 154 S.W. (2d) 63, 1.c. 67, wherein the court stated:

"The appellants contend that the General Assembly has power to provide for the transfer of a balance from the building fund to the general fund and that it has made such provision in Section 10366, R. S. Mo. 1939, Mo. St. Ann. Section 9233, p. 7096. This argument is beside the point. The statute cited might indeed cover a case where a tax was in good faith levied and collected for the erection of a building but yielded more revenue than was necessary for that purpose, so that a surplus was

left after the building was completed and paid for. It cannot, however, be made a cloak to shield the action of the Board which has intentionally levied such a tax ostensibly for building but with the knowledge that no building would be erected and with the real purpose of spending the entire revenue derived from the tax for the maintenance of its school system."

The above ruling discloses that the statute in question is to be strictly construed, and especially so, against those who would seek to make the exceptions contained therein serve an ulterior design. The wording of the statute is unambiguous and its positive directives are not to be ignored.

CONCLUSION

It is, therefore, the opinion of this department that:

- (1) County and township collectors, in reporting monthly collections of school taxes to treasurers of school districts reorganized and enlarged pursuant to Senate Bill No. 307, Laws of Missouri, 1947, Volume II, page 370, should report the amount collected in each district forming a component part of the reorganized district so long as each component district has assessed a school tax therein for subsequent levy and collection and the same has not been subjected to revision by the reorganized and enlarged district before such original levy was acted upon. If the reorganized district has withdrawn the estimates filed by the component districts and filed a new estimate, of course the report of the collector shall show only the amount of the different funds for the entire reorganized district.
- (2) County and township treasurers, in making a turnover of all funds in their hands to the credit of the various districts composing the reorganized and enlarged districts formed pursuant to authority contained in Senate Bill No. 307, Laws of Missouri, 1947, Volume II, page 370, should submit a statement of the amount to the credit of each district, broken down as to funds (teachers, incidentals, etc.).
 - (3) The board of directors of a reorganized and enlarged

school district operating under the provisions of Senate Bill No. 307, Laws of Missouri, 1947, Volume II, page 370, does not have authority to reallocate the moneys received from county and township treasurers and county and township collectors to the teachers' fund and incidental fund, according to the needs determined by such board of directors, but must be guided solely by the provisions contained in Section 10366, R. S. Mo. 1939, as reenacted, Laws of Missouri, 1943, page 893.

Respectfully submitted,

JULIAN L. O'MALLEY Assistant Attorney General

APPROVED:

J. E. TAYLOR Attorney General

JLO'M:VLM

WATER DISTRICTS: REVENUE BONDS: REGISTRATION: Special obligation revenue bonds payable out of income of a public water district are not required to be registered by the State Auditor.

September 27, 1949

FILED 4/

19/3/49

Honorable W. H. Holmes State Auditor of Missouri Jefferson City, Missouri

> Attention: Mr. Alvin C. Papin Bond Clerk

Dear Mr. Holmes:

This will acknowledge your letter of recent date requesting the opinion of this department whether Special Obligation Bonds payable out of revenues of the Water District issued by a public water supply district under the provisions of Section 12632, R.S. Mo. 1939, should be registered by the State Auditor.

Your letter requesting our opinion on the subject is as follows:

"We enclose herewith copy of letter received from the law offices of Stinson, Mag, Thomson, McEvers & Fizzell, Kansas City, Missouri relating to \$70,000 Revenue Bonds issued by Public Water Supply District No. 1, Jackson County, Missouri.

"You will notice that this law firm desires to know whether or not these Special Obligation Bonds, payable out of the revenues of the Water District, should be registered by the State Auditor. Please let us have your opinion concerning this matter at your early convenience."

With your letter you transmit a copy of the letter of the law firm of Kansas City, Missouri, named in your letter,

counsel for Public Water Supply District No. 1 of Jackson County, Missouri, the water district interested and involved in the question of the registration of bonds payable out of the revenues of the water district recently voted and issued in the sum of \$70,000.00 by the water district, according to the provisions of Section 12632, Article 12, Chapter 79, R.S. Mo. 1939, as amended, in which letter counsel discuss generally the question of whether such bonds must be registered by the State Auditor. That part of Section 12632 defining both general obligation bonds and special obligation bonds of a public water supply district, and providing for the method to be followed in the issuance of each class of such bonds, and the method to be followed in the payment and retirement of each kind of such bonds, is as follows:

"* * * Districts organized under the provisions of this article may issue either general obligation bonds or special obligation bonds, as hereinafter defined: Provided, however, that the type or character of bonds to be issued shall be determined by the board of directors in advance of calling the bond election and shall be stated in the notice of election as hereinabove provided. General obligation bonds. within the meaning of this article, shall be bonds issued within the limitation of indebtedness prescribed under section 12 of article X of the Constitution of Missouri. for the payment of which, both principal and interest, a direct tax may be levied upon all taxable property within the district. Before or at the time of issuing general obligation bonds, the board of directors shall provide for the collection of an annual tax, to be levied upon all taxable property within the district sufficient to pay the interest on such bonds as it falls due, and also to constitute a sink-ing fund for the payment of the principal thereof within twenty years from the date of such bonds: Provided, however, that the net income and revenues arising from the operation of the waterworks system of such district, after providing for costs of operation, maintenance, depreciation and necessary extensions and enlargements,

shall be transferred to and become a part of the interest and sinking fund applicable to such general obligation bonds, unless or until such net revenues are pledged to the payment of special obligation bonds as hereinafter provided. Special obligation bonds, within the meaning of this article, shall be bonds payable, both as to principal and interest, wholly and only out of the net income and revenues arising from the operation of the waterworks system of any such district, after providing for costs of operation, maintenance. depreciation and necessary extensions and enlargements, and such bonds shall not be deemed to be indebtedness of any such district within the meaning of any constitutional or statutory limitation upon the incurring of indebtedness. Before or at the time of issuing any such special obligation bonds, the board of directors shall pledge such net income and revenues to the payment of such bonds, both principal and interest, and shall covenant to fix, maintain and collect rates for water and water service supplied by such district so as to assure that such net income and revenues will be sufficient for the purposes herein required. * * *."

We are further informed by the letter of counsel for the water district that following a decision by our Supreme Court upholding the constitutionality of the Public Water Supply District Act of 1935, the practice has been followed by water supply districts to obtain registration by the State Auditor of a substantial number of Special Obligation Bonds payable out of the revenues of water supply districts in Jackson County, Missouri, and to some extent, in St.Louis County, because of the direction, as it is said, of your department that such special obligation bonds should be registered by the State Auditor.

We are further advised from the letter of counsel that, if your department requires their registration, under an opinion from this department in this instance, such bonds will be presented to your office for registration.

The letter of counsel refers us to the case of State ex rel. City of Fulton vs. Smith, State Auditor, 355 Mo. 27, 194 S.W. (2d) 302, decided by our Supreme Court in 1946, but,

it is said by counsel, that inasmuch as bonds of this character are not issued under Section 27 of Article VI of the Constitution of Missouri, 1945, the Fulton case does not expressly affect the registration of special obligation bonds of water supply districts. To this we will agree because that case was where a city, and not a water supply district, issued revenue bonds, yet the reasoning and the decision in the Fulton case, on the several legal questions discussed and statutes construed cover every feature of the issuance of special obligation bonds of a water district, payable out of the revenues of the district, and the decision discusses statutes and principles to the conclusion there reached that such bonds are not eligible to registration under Section 3306, Article VI, Chapter 16, R.S. Mo. 1939, so that the Fulton case, is, we believe, the controlling authority for the conclusion to be later herein reached in this opinion that such bonds are not required to be registered by the State Auditor.

Said Section 3306 points out and defines the bonds which shall obtain validity and be negotiable by registration. This section states that before any bond issued by any county, township, city, town, village or school district or special road district or by virtue of the provisions of Articles 1, 3, 6, 7 and 8, Chapter 79, R.S. Mo. 1939, shall become valid or be negotiated such bonds shall be presented to the State Auditor and registered by him. The bonds issued by any of the named public bodies required to be registered by said Section 3306 would necessarily be tax redeemable bonds. They do not include special obligation bonds payable from the net revenue and income derived from the operation of any public utility, such as a public water supply district, and the Fulton case so holds, as we understand the case.

It is further stated in the letter of counsel that special obligation bonds of water supply districts are not issued under the provisions of Section 27, Article VI of the Constitution of Missouri, 1945. This is true, and for two especial reasons, first, because said Section 27 of said Article VI, in defining the public bodies which may vote and sell their negotiable interest bearing revenue bonds must accomplish the object of the vote by a four-sevenths vote of the qualified electors thereof voting thereon, whereas, Section 12632 of Chapter 79, R.S. Mo. 1939, and under which section the public water district in question is organized and under the terms of which the bond issue voted was had, requires that a two-thirds majority vote of the qualified voters of the district voting on the proposition shall assent

thereto. Second, because a public water supply district organized under Article 12 of Chapter 79, R.S. Mo. 1939, is neither a city or incorporated town or village in this State such as are named and permitted in said Section 27 to vote and issue revenue bonds, and under no circumstances, we believe, could a public water supply district proceed to issue revenue bonds under said Section 27. Our Supreme Court had before it the case of State ex rel. Halferty, Collector of Revenue of Clay County vs. Kansas City Light and Power Co., 145 S.W. (2d) 116, on the question of the power to assess and levy taxes against property for the benefit of a public water supply district, and incidentally to determine whether a public water supply district might be known by any other legal name than as a "political corporation" such as a "municipal township". In that case the Collector of Revenue of Clay County, Missouri, undertook by suit to collect taxes from the defendant Power and Light Co. for the benefit of Public Water Supply District No. 1 of Clay County, Missouri. The Collector of Revenue in the prosecution of the case urged that a public water supply district could be, and should be, known and designated as a municipal township, and that under that name and identity as a public body there would be authority in the statutes for the assessment and collection of taxes for the benefit of the water supply district, as a municipal township, on what is known as "distributable" property, the property of defendant so sought to be taxed coming under that description. The Court affirmed the judgment of the Circuit Court, which had held that there was no lawful authority for the levy of the taxes sought to be collected, on the ground that Public Water Supply District No. 1 of Clay County was not a "municipal township" so as to allow the assessment under such name of taxes for its benefit against the property of the defendant. The Court said that a "municipal township" is a "subdivision of a county." In the discussion of the case and in arriving at its decision that the water supply district could not be denominated by any other name than a "political corporation", as was provided in the Act creating public water supply districts (Laws of Missouri, 1935, page 327, et seq.) which provides (Section 2) that such districts shall be "political corporations" of the State, etc., the Court, 1.c. 122, said:

> "* * * This brings us to consideration of and insistence strongly urged by appellant, viz., that the water district should be regarded as a 'municipal township' within the meaning of these taxing statutes. It,

of course, is not a county nor an incorporated city, town or village. It is denominated a 'political corporation' by the act under which it was organized. * * * ."

This decision, as an analogous case, in principle and reasoning, supports the statements of counsel, and supports our view here that revenue bonds of a public water supply district may not be issued under Section 27, Article VI of the Constitution of Missouri, 1945, because not named in said section as one of the public bodies there given such power.

The Supreme Court in the Fulton case, 1.c. 306 said that by taking a narrow view of Section 3306 the section includes the registration of "* * * any bond, hereafter issued by any * * * city* * * for any purpose whatever' before the same 'shall obtain validity or be negotiated.' * * *," that it would seem to include revenue bonds as well as bonds payable through taxation. But, the Court says, this is not the effect of Section 3306, because it must be construed with other sections of the statutes in relation to the registration of bonds, naming Sections 3303 and 3304. The Court fully discusses Sections 3303 and 3304, and, in construing the three sections together, says that they relate solely to bonds payable through the collection of taxes. The Court then states that it is impossible to harmonize Sections 3303 and 3304 with Section 3306, if Section 3306 applies to revenue bonds. In other words, the Court's holding is that the three sections, 3303, 3304 and 3306, do harmonize because they all relate solely to bonds payable through the collection of taxes and that Section 3306 is not applicable to revenue bonds so as to require them to be registered by the State Auditor. The Court states that Sections 3303 and 3304 not only would be in irreconciable conflict with Section 3306 if Section 3306 included revenue bonds, but also with the constitutional mandate as to the source of payment of revenue bonds of the kind there (and here) in question, "to-wit: solely from the revenues derived by the municipality from the operation of such utility." This is apparently a reference to Section 27 of Article VI of the Constitution of Missouri, 1945, because. as the Court says, the revenue bonds authorized by the constitutional mandate are payable solely out of revenue derived from the operation of the public utility. This is the reason no doubt why counsel in their letter make the cautionary

statement that the bonds in question were not issued under the previsions of Section 27 of Article VI of the Constitution of Missouri, 1945. We think the holding in the Fulton case by our Supreme Court makes it very plain that it construes Sections 3306, 3303 and 3304 of Article VI, Chapter 16, R.S. Mo. 1939, to refer only to bonds payable by taxation, and not to bonds payable from revenue derived from income from the operation of a public utility, and that only bonds payable by taxation are required to be registered by the State Auditor under said sections.

It must then follow that the special obligation bonds, here being considered only as to their registration, issued under the provisions of Section 12632, Article 12, Chapter 79, R.S. Mo. 1939, as amended, and payable, both as to principal and interest, wholly and only out of the net income and revenues arising from the operation of the waterworks system of any such district, after providing for cost of operation, maintenance, depreciation and necessary extensions and enlargement, are not controlled by the terms of said Sections 3306, 3303 and 3304, and are not required to be registered by the State Auditor.

CONCLUSION

It is, therefore, the opinion of this department that, considering the above facts and authorities, special obligation bonds issued by a public water supply district, payable, as to both principal and interest, wholly and only out of the net income and revenue from the operation of the waterworks system of any such district, are not required by the statutes of this State to be registered by the State Auditor.

Respectfully submitted,

APPROVED:

GEORGE W. CROWLEY Assistant Attorney General

J. E. TAYLOR Attorney General

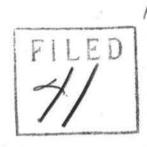
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C. TY CLERKS: CONSTITUTIONAL LAW: Sec. 11238, H. B. No. 126, repeals fee provisions of Sec. 11049, Laws of Mo. 1947, Vol. II, p. 429. Fees provided in H. B. No. 126 can be retained by incumbent county clerks of third and fourth class counties.

Minus

November 23, 1949

Hon. W. H. Holmes State Auditor Jefferson City, Missouri



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Dear Sir:

This department is in receipt of your request for an official opinion, which reads as follows:

"Please advise this department with an official opinion on the following questions:

"1. Does H. B. 126, 65th. General Assembly, repeal Section 11049, 2147, page 429, or are county clerks entitled to receive for the compensation of ten cents per hundred words and figures extending tax books under Section 11049 and also the three cents per name for the like services under H. B. 126?

"2. Inasmuch as H. B. 126 becomes effective October 14, 1949 and the 1949 tax books are in process of preparation at that time, would the county clerks be entitled to draw compensation under this act for the 1949 tax books?"

House Bill No. 126 of the Sixty-fifth General Assembly provides in part as follows:

"Section 11238. The following fees and compensation shall be allowed to and retained by the several officers and persons herein named, as unaccountable fees, in addition to the salary and other fees now provided by law, for services rendered under the provisions of the chapter, viz.:

I. To Clerks. -- To the clerk of the county court, for extending the tax on the

assessment book, three cents for each name, to be paid by the state and county in proportion to the number of tax columns used by each."

"All laws, or parts of laws in conflict or inconsistent herewith are hereby repealed."

Section 11048, Laws of Missouri, 1945, page 1958, provides as follows:

"The assessor's book shall be corrected and adjusted not later than September 1 of each year. The clerk of the county court in each county, upon receipt of the certificates of the rates levied by the county court, school districts and other political subdivisions authorized by law to make levies or required by law to certify levies to the county court or clerk of the county court, shall then extend the taxes in the assessor's book, in proper columns prepared for such extensions, according to the rates levied; and shall on or before the 31st day of October of each year deliver the tax book with the rates extended therein to the collector. The assessor's book, with the taxes so extended therein, shall be authenticated by the seal of the Court as the Tax Book for the use of the Collector; and when the assessor's book is in two or more volumes, such extension shall be made in all such volumes, and each volume shall be authenticated by the clerk with the seal of the court. And upon a failure to make out such extension of taxes in the assessor's book or books, as the case may be, and deliver same to the collector not later than October 31, the county court shall deduct twenty per centum from the amount of fees which may be due the clerk for making such extension, and such assessor's book, with the taxes so extended therein, shall be called the 'Tax Book.'"

Section 11049, Laws of Missouri, 1947, Volume II, page 429, provides in part as follows:

" * * * The clerks of the county courts shall receive ten cents per hundred words

and figures for all words and figures extended by him in making out the tax book, one-half thereof to be paid by the state and other half by the counties, respectively:

It will be noted that both Section 11238 of House Bill No. 126 and Section 11049, Laws of Missouri, 1947, Vol. II, page 439, provide fees to the county clerk for doing exactly the same thing, to wit, for extending the taxes on the assessor's tax book. To understand this apparent conflict we must look to the history of these acts. These laws appeared for the first time in what is substantially their present form in 1866. What is now Section 11048 was Section 51, Laws of Missouri, 1866, page 137, and provided that the clerk of the county courts should extend the taxes on the assessor's books and "within ninety days thereafter make a fair copy thereof, authenticated by the seal of the court for the use of the collector, and upon a failure to make out and deliver to the collector such copy in the time specified, the county court shall deduct twenty per centum from the amount of fees which may be due the clerk for making such copy, and such copy of the assessor's book shall be called the 'tax book." Section 52 of the act, which is now Section 11049, provided that the clerk would receive ten cents per hundred words and figures for making out and copying the tax book, one-half to be paid by the state and the other half by the counties, respectively. What is now Section 11238 will be found in Section 11138, Laws of Missourd, 1866, page 165, and is identical with the wording of House Bill No. 126, except for the provision that the fees may be retained by the several officers and persons as accountable fees. This provision read as follows:

> "The following fees and compensation shall be allowed to the several officers and persons herein named, for services rendered under the provisions of this act, viz:

"To Clerks--lst. To the clerk of the county court, for extending the tax (on the tax) book, three cents for each name, to be paid by the State and county in proportion to the number of tax columns used by each."

Therefore, it will be seen that, under the law as it was first passed, the county clerk received a fee of three cents for extending the taxes and a further fee of ten cents for each hundred words and figures for preparing a copy of the assessor's book, which copy the county clerk then turned over to the collector as the tax book.

These sections remained substantially unchanged until 1933 when what is now Section 11048 was amended by doing away with the requirement that the clerk of the county court would make a fair copy of the assessor's books, which copy was to be turned over to the collector, and providing that the assessor's book itself, with the taxes extended, was to be turned over to the collector. Laws of Missouri, 1933, page 421. This 1933 amendment is Section 11048 as it is today. What is now Section 11049 was also amended in 1933, and the fee of ten cents per hundred words and figures for making the copy of the assessor's book was changed to read as it does today, to wit, ten cents per hundred words and figures for all words and figures extended by him in making out the tax book. Laws of Missouri, 1933, page 421.

From this review it will be seen that until 1933 the county clerk received both fees because they were paid for two different and distinct duties. However, in 1933 the duty of preparing a copy of the assessor's book was eliminated and a fee of ten cents per hundred words and figures was granted for the clerk's work in extending the taxes. Since this law was in conflict with the earlier statute which provided a fee of three cents per name for doing exactly the same thing, then the 1933 law, since it was a later law, repealed the earlier section by implication. State ex inf. Taylor v. American Insurance Co., 355 Mo. 1053, 200 S.W. (2d) 1. This fee of ten cents per hundred words and figures was the proper and only fee that would be allowed to county clerks until these sections were changed again.

In 1945 the Legislature repealed and re-enacted Sections 11048, 11049 and 11238. The law at this period becomes greatly confused, but a review of these changes must be made in this opinion. The first amendment was that of Sections 11048 and 11049, which amendment went into effect by reason of emergency clause on November 30, 1945. This amendment was negligible, the only changes being that in Section 11048 it provided that the assessor's books should be corrected not later than September 1 of each year, and the change in Section 11049 being the substitution of the State Tax Commission for the Auditor as the person to whom the record should be forwarded. Laws of Missouri, 1945, page 1817.

Section 11238 was also amended at the same session, which law went into effect January 25, 1946 (Laws of Missouri, 1945, page 1823). This amendment added the following provision at the beginning of the section: "Except in counties having a population in excess of 100,000." This section was again

amended at that session, and this act went into effect July 3, 1946 (Laws of Missouri, 1945, page 1956). This last emendment eliminated the provision exempting counties having a population in excess of 100,000 and added the following provision: "Provided that in counties of the first and second class and the City of St. Louis all fees and compensation allowed in this section shall be paid into the county or city treasury, as provided by law, by the several officers and persons herein named who shall have received any such fees and compensation."

The General Assembly also amended Section 11048 again to the form that it is today, and this law went into effect July 6, 1946 (Laws of Missouri, 1945, page 1958). In 1947, Section 11049 was repealed and re-enacted, the only change being that the Director of Revenue was substituted for the State Tax Commission as the proper agency to furnish the blanks and instructions and to whom the statement should be forwarded (Laws of Missouri, 1947, Vol. II, page 429).

From a reading of the above it will be seen that on November 30, 1945, the county clerks were entitled to a fee of ten cents per hundred words and figures for extending the tax book. From that time until the passage of House Bill No. 126 by the present General Assembly the fee that was permitted the county clerks for this duty has been in a state of flux and confusion. However, in view of the fact that House Bill No. 126 is the latest legislative pronouncement upon this matter, the fee provided therein, that is, three cents for each name, is the fee that is permitted to be charged by the present clerks and the fee provided for in Section 11049 may not be allowed them.

We next take up the question as to whether this is an accountable fee or whether the county clerks are entitled to retain the fee for their work in extending the tax books.

The law providing for fees of county clerks for performance of the duties set out in this section have been in the statutes since 1865. Until 1937 county clerks were allowed to retain as their compensation fees earned up to certain amounts, depending on the population of the county. County clerks were placed on a salary basis by Section 11811, Laws of Missouri, 1937, page 441, which repealed and re-enacted that section of the Laws of 1933, page 370.

Section 11811, supra, contained the following provision:

" a a It shall be the duty of the clerks of county courts to charge and collect in all cases every fee accruing to their offices by law, except such fees as are chargeable to the county, and such clerk shall, at the end of each month, file with the county court a report of all fees charged and collected during said month stating on what account such fees were charged and collected, together with the names of the persons paying or who are liable for same, which said report shall be verified by the affidavit of such clerk. It shall be the duty of such clerks upon the filing of said report to forthwith pay over to the county treasury all moneys collected by them during the month and required to be shown in said monthly report, taking a duplicate receipt therefor, one of which shall be filed in his office and every such clerk shall be liable on his official bond for all fees collected and not accounted for by him and paid into the county treasury as herein provided."

The Sixty-third General Assembly, in order to carry out the provisions of the Missouri Constitution of 1945 (Sections 8 and 11, Article VI), in respect to classification of counties and compensation of officers therein, carried the foregoing provision of the 1937 salary act over and re-enacted the same so that it would apply to counties according to classification.

The law applicable to salaries of county clerks in first class counties is found in Sections 2, 3 and 4, page 575, Laws of Missouri, 1945. Section 4 thereof reads as follows:

"The compensation hereinabove provided, shall be paid in monthly installments on the first day of each month, out of the county treasury, and shall be in lieu of and include all salaries, including, but not limited to, all salaries, per diem, and any other compensation whatsoever received or provided for as member of board of parole, board of equalization, board of zoning adjustment, board of jury commissioners, or any other board, bureau or commission established by law, and any or all fees, emoluments or grants for all duties performed and required of such officer by law, any statute or provision of law to the contrary notwithstanding."

This section specifically states that the salary provided for in Sections 2 and 3, mentioned above, shall be in lieu of any and all fees, emoluments or grants for all duties performed and required of such officer by law, any statute or provision of the law to the contrary notwithstanding.

Section 3, page 1559, Laws of Missouri, 1945, relating to second class counties, reads as follows:

"It shall be the duty of the clerk of the county court to charge, receive and collect in all cases every fee accruing to his office by law, except such fees as are chargeable to the county, and such clerk shall, at the end of each month, file with the county court a report of all fees charged and collected during said month, stating on what account such fees were charged and collected, together with the names of all persons paying the same or who are liable for the same, and said report shall be verified by said county clerk. It shall also be the duty of such clerk upon the filing of said report forthwith to pay over to the county treasury, all moneys collected by him during the month, due the county, and required to be shown in said monthly report. He shall take a duplicate receipt therefor and one shall be filed promptly in his office, and every clerk shall be liable on his official bond for all fees collected and not accounted for by him and paid into the county treasury, as herein provided."

Section 7, Laws of Missouri, 1945, page 1547, relating to counties of the third class, reads as follows:

"It shall be the duty of the clerk of the county court in counties of the third class to charge and collect in all cases every fee accruing to his office by law, except such fees as are chargeable to the county including his per diem as secretary of the board of equalization. Such clerks shall, at the end of each month, file with the county court a report of all fees charged and collected during said month, stating on what act said fees were charged and collected, together with the names of the persons paying

or who are liable for same, which report shall be verified by the affidavits of such clerk. It shall be the duty of such clerk upon the filing of said report to forthwith pay over to the county treasurer all moneys collected by him during the month and required to be shown in said monthly report, taking a duplicate receipt therefor, one of which shall be filed in his office and every such clerk shall be liable on his official bond for all fees collected and not accounted for by him and paid into the county treasury as herein provided."

Section 7, Laws of Missouri, 1945, page 1526, relating to counties of the fourth class, reads as follows:

"It shall be the duty of the clerk of the county court in counties of the fourth class to charge and collect in all cases every fee accruing to his office by law, except such fees as are chargeable to the county, and such clerks shall, at the end of each month, file with the county court a report of all fees charged and collected during said month, stating for what act said fees were charged and collected, together with the names of the persons paying or who are liable for same, which report shall be verified by the affidavits of such clerk. It shall be the duty of such clerk upon the filing of said report to forthwith pay over to the county treasurer all moneys collected by him during the month and required to be shown in said monthly report, taking a duplicate receipt therefor, one of which shall be filed in his office and every such clerk shall be liable on his official bond for all fees collected and not accounted for by him and paid into the county treasury as herein provided."

Therefore, it will be noted from the above statutes that the law specifically states that county clerks of counties of the first class shall receive a salary which shall be in lieu of all and any fees, emoluments or grants for all the duties performed by said clerk. The sections that relate to the county clerks of second, third and fourth class counties provide that

they shall pay over to the county treasurer all money collected by them during the month and required to be shown in said monthly report.

It is for us to determine whether the fee allowed for the . extension of the tax book is a fee to which the county clerk is entitled in addition to his salary. The primary rule of statutory construction is to ascertain and give effect to the lawmaker's intent. Meyering v. Miller, 330 Mo. 855, 51 S.W. (2d) 65; Cummins v. Kansas City Public Service, 334 Mo. 672, 66 S.W. (2d) 920. With this rule in mind we turn to the statutes dealing with the fee of the county clerk for extending the tax books. The first amendment of Section 11048 which went into effect in November, 1945, provided that if the clerk fails to make out such extension of taxes on the tax books before a certain date, then the county court shall deduct twenty per cent from the amount of the fees due the clerk for making such extension. the fees are not to be allowed the clerk for extending the taxes it would render nugatory this provision that twenty per cent of the fees were to be taken away from him. In ascertaining the legislative intent, one rule that may be followed is the maxim that the expression of one thing implies the exclusion of the other (expressio unius est exclusio alterius). State ex inf. Conkling v. Sweaney, 270 Mo. 685, 195 S.W. 714. In carrying out this maxim, 59 C. J. 984 states that where a statute "directs the performance of certain things by a particular person it implies that it shall not be done by a different person."

The provision in Section 11238, which was in the 1945 enactment and is in the present bill, provides that in counties of the first and second class and the City of St. Louis all fees and compensation allowed in this section shall be puid into the county or city treasury, as provided by law, by the several officers and persons herein named who shall have received any such fees and compensation. This provision specifically states that in counties of the first and second class and the City of St. Louis fees and compensation must be paid into the county and city treasury. Applying the rule of statutory construction that where particular officers are directed to do a certain thing, it implies that other officers are exempted from such requirement.

Further, the first amendment of Section 11238, passed by the Sixty-third General Assembly (Laws of Missouri, 1945, page 1823), provided that except in counties in excess of 100,000 the county clerk should receive a fee for extending the tax on the assessment book. This exception was placed in the law because of Section 12, Article VI of the Constitution of Missouri, 1945, which provides:

"All public officers in the City of St. Louis and all state and county officers in counties having 100,000 or more inhabitants, excepting public administrators and notaries public, shall be compensated for their services by salaries only."

If the Legislature had intended that all county clerks should pay over and account for the fees received in extending the tax book, then it was not necessary to include this exception. Therefore, when it excluded county clerks of counties of over 100,000, who were by the Constitution on a strict salary basis, it must have considered the fees allowed for extending the tax book as fees to which the other county clerks were entitled.

The further amendment of 1946, in which it was provided that in counties of the first and second class and the City of St. Louis all fees and compensation allowed to be paid into the county or city treasury, was probably substituted for the earlier provision relating to counties of over 100,000 in order to comply with Section 8 of Article VI of the Constitution of Missouri, 1945, which provides that "all counties within the same class shall possess the same powers and be subject to the same restrictions." However, the reasoning applicable to the first 1946 amendment of Section 11238 is equally applicable to the later amendment. Therefore, it would appear that the fee allowed to the county clerk for extending taxes has been, and is now, an unaccountable fee.

The question next arises whether the present county clerks are entitled to the fee provided in House Bill No. 126. true that Section 13 of Article VII, Constitution of Missouri, 1945, provides that the compensation of any state, county or municipal officer shall not be increased during the term of office. However, as we have pointed out, this fee allowed the county clerks has, at least since November, 1945, been unaccountable, and therefore the provision of House Bill No. 126 did not increase compensation during the present term of the clerks, which began January 1, 1946. One other question in regard to this constitutional prohibition against increase during the term might arise, and that is whether the change from the ten cents per hundred words and figures, as provided by the 1933 act, to three cents per name, as provided for in the 1949 act, would be an increase in compensation. In Forgrave v. Buchanan County, 282 Mo. 599, 222 S.W. 755, it is held that a statute will not be held to increase an officer's compensation, contrary to such constitutional provision, "unless it appears, as a matter of law, on the face of the act itself, that the officer's compensation is thereby increased." With this rule in mind, we believe it

cannot be held that on its face House Bill No. 126 increases the clerk's compensation, contrary to Section 13, Article VII, Constitution of Missouri, 1945.

CONCLUSION

It is, therefore, the opinion of this department that House Bill No. 126, enacted by the Sixty-fifth General Assembly, which provides a fee of three cents per name to the county clerks, repeals Section 11049, Laws of Missouri, 1947, Vol. II, page 429, which allows county clerks a fee of ten cents per hundred words and figures for extending the tax book. It is further the opinion of this department that county clerks of the third and fourth class counties are entitled to draw this fee as compensation for extending the 1949 tax book.

Respectfully submitted,

ARTHUR M. O'KEEFE Assistant Attorney General

APPROVED:

J. E. TAYLOR Attorney General

AMO'K:ml

PROLLE JUDGES:

MAGISTRATES:

Probate judge and ex-officio magistrate in county of 30,000 inhabitants or less, files his official bond as prerequsite to qualifying for probate judge. Premium due on such bond is to be paid by County Court only when such bond is a surety bond authorized by the county under the provisions of Sec. 3238, R.S. Mo. 1939. Cost of such bond not to be paid out of State Magistrate fund.

February 28, 1949.

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FILED 42

Ronorable C. I. Hoy Judge of the Probate Court Crawford County Steelville, Missouri

Dear Judge Hoy:

Further replying to your letter of recent date, this department renders its opinion touching the second inquiry contained in your letter, the pertinent part of such letter reading as follows:

"* * * I should like to be advised whether or not it is incumbent upon me as Probate Judge of Crawford County to pay the premium on my bond of \$2000.00 imposed upon me, or whether that is to be paid out of the state funds."

Records of the Secretary of State's Office disclose that Crawford County is in the fourth class of counties in Missouri, with a population of less than thirteen thousand inhabitants.

We direct your attention to Section 18, Article V, of the Constitution of 1945, which provides for the magistrate courts, and which, in part, reads as follows:

"There shall be a magistrate court in each county. In counties of 30,000 inhabitants or less, the probate judge shall be judge of the magistrate court * * *."

The effect of the constitutional provision just referred to is to combine the offices of probate judge and magistrate in counties with 30,000 inhabitants or less, and to invest one person with the duty and authority to perform the functions of both offices. That one person shall be the probate judge. In

Feby. 28, 1949.

this regard, the wording of the Constitution is clear and unambiguous

Section 13404, Laws of Missouri 1947, Vol. II, p. 356, provides that the judge and clerk of the probate court in counties with 30,000 inhabitants, or less, shall give a separate, good and sufficient bond in a penal sume of \$2000.00. This law does not provide that the cost of such bond shall be paid by the county. The bond is given as a condition precedent to the right of the judge of the probate court to enter upon his duties as such official, and is provided for in the law covering salaries and fees of probate judges. No provision has been found, in the law governing magistrate courts, which would require the probate judge, as ex-officio magistrate in counties of 30,000 inhabitants, or less, to enter into a separate and additional bond before carrying out his duties as such magistrate.

Section 2811.123, Mo. R.S.A. (Laws 1947, Vol. I, p. 243), provides for a state magistrate fund, but it is therein provided that such fund shall be used exclusively for the payment of salaries of magistrates, their clerks, deputies and employees, and for the payment of the cost of surety bonds furnished by a clerk or deputy clerk. A reading of this section discloses that a magistrate, as such, is not within the purview of the clause covering costs of surety bonds.

Having determined that the only bond required of the judge of the probate court, and ex-officio magistrate, in a county of 30,000 inhabitants or less, is that provided for in section 13404, Laws of Missouri 1947, Vol. II, p. 356, and that such law does not obligate the county to pay for same, we must find authority in another statute if we are to obligate the county for such an expenditure. Otherwise, the official must bear the cost of a surety bond if he chooses to file such a bond.

Attention is directed to Section 3238, R.S. Missouri 1939, which provides as follows:

"Whenever any officer of this state or of any department, board, bureau or commission of this state, or any deputy, appointee, agent or employee of any such officer; or any officer of any county of this state, or any deputy, appointee, agent or employee of any such officer, or any officer of any incorporated city, town or village in this state, or any deputy appointee, agent or employee of any such officer; or any officer of any department, bureau or commission of any county, city, town or village, or any deputy, appointee, agent or employee of any such officer, or any officer of any district, or other subdivision of any county, or any incorporated city, town or village, of this state, or any deputy appointee, agent or employee of any such officer, shall be required by law of this state, or by charter, ordinance or resolution, or by any order of any court in this state, to enter into any official bond, or other bond he may elect, with the consent and approval of the governing body of such state, department, board, bureau, commission, official, county, city, town, village, or other political subdivision, to enter into a surety bond, or bonds, with a surety company or surety companies, authorized to do business in the state of Missouri, and the cost of every such surety bond shall be paid by the public body protected thereby.

The statute just quoted was construed in the case of Berry v. Linn County, 195 S.W. (2nd) 502, 355 Mo. 191. The Supreme Court of Missouri disclosed the intent and purpose of this statute

in the following language: "The intent of Section 3238 is clear. It provides when an officer chooses to give a surety company bond, the cost of it shall not be imposed on the county unless the county agrees." The language used in Berry v. Linn County, supra, discloses the rule to be followed in disposing of the question at hand. CONSLUSION It is the opinion of this department that the cost of the penal bond required of a judge of the probate court, and ex-officio magistrate in a county of 30,000 inhabitants or less, is to be borne by the county only in the event a surety bond is required by the county court pursuant to authority contained in Section 3238, R.S. Mo. 1939, and that the cost of such bond is not to be paid out of the State magistrate fund. Respectfully submitted, JULIAN L. O'MALLEY Assistant Attorney General APPROVED: J. E. TAYLOR Attorney General JLO'M:p

Feby. 28, 1949

Honorable C. I. Hoy

COUNTY TREASURERS: EX-OFFICIO COLLECTORS: Provisions of House Bill No. 80 not applicable to incumbent treasurers and ex-officio collectors.

July 11, 1949



Honorable Marvin C. Hopper Prosecuting Attorney Linn County Brookfield, Missouri

Dear Sir:

This is in answer to your letter of recent date requesting an official opinion of this department and reading as follows:

"Under the provisions of House Bill No. 80 recently enacted by the Legislature and signed by the Governor, will incumbent County Treasurers be permitted to collect the commission increases as provided by said Bill after the effective date of said Bill."

House Bill No. 80 of the 65th General Assembly, repealing and reenacting Section 13993, R. S. Mo. 1939, provides in part as follows:

"The county treasurer in counties adopting township organization shall be allowed a salary of not less than \$100.00 per month by the county court to be paid as at present provided by law; the ex officio collector for collecting and paying over the same shall be allowed a commission of three per cent (3%) on all corporation taxes, back taxes, licenses, merchants' tax and tax on railroads, and two per cent (2%) on all delinquent taxes, which shall be taxed as costs against such delinquents and collected as other taxes: provided, he shall receive nothing for paying over money to his successor in office."

The only change in such reenacting section is to increase the commission on corporation taxes, back taxes, licenses, merchants tax and tax on railroads from two per cent to three per cent. Section 13, Article VII, Constitution of Missouri, 1945, provides as follows:

"The compensation of state, county and municipal officers shall not be increased during the term of office; nor shall the term of any officer be extended."

In the case of Little River Drainage District vs. Lassater, 29 S.W. (2d) 716, the Supreme Court held that a statute authorizing an increase in the compensation of township collectors by authorizing the collectors to retain a greater percentage of drainage and levee district taxes did not violate Section 8 of Article XIV of the Constitution of 1875, which section was the forerunner of Section 13 of Article VII of the present Constitution quoted supra. The court said, 1.c. 719:

"Appellant contends that section 4575 authorizes an increase in the compensation of township collectors during their terms of office and hence violates section 8, of article 14, of the Missouri Constitution, which provides that 'the compensation or fees of no State, county or municipal officer shall be increased during his term of office. * * * ' As neither county collectors nor township collectors, in respect to their services, in collecting the taxes of drainage districts, perform any of the duties of state, county, or municipal officers, it would seem that the fixing of their compensation for rendering such services to drainage districts is not controlled by section 8, art. 14, of the Constitution.

"The constitutional inhibition only applies to compensation or fees of officers for performing duties incident to their offices, and has no application to additional duties imposed upon such officers not ordinarily incident to their offices. * * * *

"The collection of drainage district taxes is no part of the duties ordinarily incident to the office of county and township collectors. Such duties are additional duties dependent upon the existence of a drainage district having lands, taxable for district purposes, lying within the territorial jurisdiction of such officers. In collecting

such taxes, county and township collectors are officers and agents of the particular drainage district. They are required to give separate bonds to such district. Section 4396, R. S. 1919. The provisions of section 8, art. 14, of the Constitution, are not violated by section 4575."

Since the collection of corporation taxes, back taxes, licenses, merchants' tax and tax on railroads is incident to the office of treasurer and ex-officio collector in counties under township organization, we believe it to be clear that the provisions of Section 13, Article VII of the Constitution of Missouri, 1945, prohibit the treasurers and ex-officio collectors, who are in office upon the effective date of House Bill No. 80, from receiving during their present terms the compensation provided for therein.

CONCLUSION

It is the opinion of this department that the provisions of House Bill No. 80 of the 65th General Assembly will not be applicable to the incumbent treasurers and ex-officio collectors in counties under township organization during their present terms of office.

Respectfully submitted,

C. B. BURNS, JR. Assistant Attorney General

APPROVED:

J. E. TAYLOR Attorney General

CBB:VLM

OPENING OF No formal opening of Probate or Magistrates court is COURTS: required.

November 21, 1949

11/22/49

Honorable Calvin F. Hoy Judge of the Probate and Magistrate Courts of Crawford County, Steelville, Missouri



Dear Sir:

This office is in receipt of your recent request for an official opinion. The matters upon which you desire an opinion are thus stated by you.

"There seems to be some confusion and misunderstandings relative to the Sheriff's duty regarding the attendance of Probate and Magistrate Courts.
The law specifies that the Sheriff or his Deputy
shall be entitled to \$3.00 per day for attendance
upon these Courts. The question is: Do the
Probate and Magistrate Courts have to be opened
and be in session in order to make their judgments
valid, and if so, is it mandatory that the Sheriff
shall open the Court, or, can the Judge open his
own Court?

"Under Section 14 of the 1945 Magistrate Code, the statute provides that the Magistrate shall hold Court for trials of all causes as often as may be necessary to meet the needs of justice, and he may hold Court on any day, except Sunday, and when so required the Sheriff shall be present in person, or one of his Deputies shall attend the Court; it does not specify what his duties are.

"In Section 2034, 1939 Statute, the law provides that the Sheriff shall attend each Court held in their County except where it shall otherwise be directed by law and then specifies the duty of the attending officer, which shall be to furnish stationery, fuel and other necessary things for the use of the Court. It will be noted that in none of these provisions does the law state specifically that it is the duty of the Sheriff or his Deputy to open Court, but it has been a custom for many years for the Sheriff to open Court for the transactions of it's

business. In State Ex Rel vs. Brown, 146 Mo. 401, which was a mandamus proceeding by the Sheriff of the City of St. Louis against the City Auditor to compell the auditor to pay to the Sheriff certain fees for attendance upon the Court, which is a statutory requirement, which must be strictly construed. the question is: Is this \$3.00 fee a statutory fee that can be charged for the opening of Courts, or, can only be charged for the things enumerated in the sections herein set out? And is it necessary for the Magistrate in having a trial with, or without a jury, to be formally opened in order to make his judgments valid, and if so, does he have the authority to open his own Courts, or must it be done by the Sheriff or his Deputies?

"In these small counties, as you know, the Magistrate Judge is also a Juvenile Judge and a Probate Judge. Assuming that he would have an insanity hearing and would have to call a special term in his Probate Court, and then have a trial of a criminal case with or without a jury in the Magistrate Court, in that event would it be necessary to open both Courts formally in order to carry out the regular duties of the Court and make his judgments secure? I am frank to say, that I have found no decision construing this statute by our higher courts for which reason I am asking your opinion on this question?"

We believe that at the beginning of our consideration of these various issues we should point out that the offices of probate and magistrate judge are separate and distinct. This fact is well established and does not, we believe, need to be supported by citations of law.

We would also point out that both courts are courts of record. Section 2034, Mo. R.S.A. 1939, states:

"The several sheriffs shall attend each court held in their counties, except where it shall otherwise be directed by law; and it shall be the duty of the officer attending any court to furnish stationery, fuel, and other things necessary for the use of the court whenever ordered by the court."

However, this section was amended by the Laws of 1945, page 805, and now reads, 2034 Mo. R.S.A. 1939, as amended:

"The several sheriffs shall attend each court held in their counties, when so directed by the court; and it shall be the duty of the officer attending any court to furnish stationery, fuel, and other things necessary for the use of the court whenever ordered by the court." (Underscoring ours.)

This section would of course apply to both probate courts and magistrate courts.

Section 2811.114, Mo. R.S.A. 1939, states:

"Every magistrate may hold court for the trial of all causes of which he has jurisdiction as often as may be necessary to meet the needs of justice, and may hold such court on any day, except Sunday, on which any cause may be set for trial, or any cause adjourned; and when so required the sheriff shall be present in person or by deputy and attend on said court." (Underscoring ours.)

By the two above sections therefore it is made clear that it is no longer the duty of the sheriff to attend upon a court unless he is directed by the court to attend. This being so, the inference is plain that the probate judge may open the probate court himself, and that as magistrate judge he may open magistrate court.

However, there is no current Missouri law requiring that a court be formally opened by any official making a public proclamation to that effect; by uttering the words "Hear Ye! Hear Ye! The honorable court of is now in session;" or by any other word or act. In regard to this matter Laws of Missouri 1943, page 359 (Sec. 847.9 Mo. R.S.A. 1939), states:

"Section 9. Term of court shall convene and expire, how and when. -- Every term of court shall commence and convene by operation of law at the time fixed by statute without any act, order, or formal opening by a judge, the judges, or other officials, and shall continue to be open at all times until and including the day preceding the next regular term on which

day it shall expire by operation of law."

"Annotation."

"Oklahoma Laws 1935, art 2, sec. 1, p. 29 (20 Okl. Stat. Ann. sec 95). No change made in the Legislature. See Mo. R.S.A. secs. 2013-2021 repealed by implication.

"Under this section the formal opening and continuance of court terms are not required."

The above quoted section is part of the new Civil Code of Missouri which became effective January 1, 1945.

Laws of Missouri, 1943, page 357 (Sec. 847.2 Mo. R. S. A. 1939) under the heading: "Designation and scope of code" reads:

"Sec. 2. This code shall be known and cited as the Civil Code of Missouri and shall govern the procedure in the supreme court, court of appeals, circuit courts and common pleas courts in all suits and proceedings of a civil nature whether cognizable as cases at law or in equity, unless otherwise provided by law. It shall be construed to secure the just, speedy, and inexpensive determination of every action."

The above section does not state that probate courts shall be governed by this code, and at the time of passage of the Civil Code magistrates were not yet in existence, but if the Supreme Court of Missouri, the Missouri courts of appeals, circuit courts, and courts of common pleas, do not have to be formally opened by a judge or other official (see Sec. 847.9 quoted above), we cannot conceive that such inferior courts as probate and magistrate would have to be so opened. Furthermore, as pointed out above, there is no Missouri law stating that probate and magistrate courts should be formally opened.

In further consideration of these issues, we would point out that by Section 2034, Mo. R.S.A. 1939, as amended, quoted above, a probate judge may have the sheriff in attendance upon his court whenever he so desires; and that by Section 2811.114, Mo. R.S.A. 1939, the magistrate may do likewise. Since these are two separate courts, as we stated above, the sheriff would be entitled, under Section 13411, Mo. R.S.A. 1939, to \$3.00 for attending each court, and \$6.00 per day for the two if he attended both of them the same day. Section 13411, in that part pertinent to this issue reads:

"Fees of sheriffs shall be allowed for their services as follows:

* * * * * * * * * * * * * * * *

"For attending each court of record or criminal court and for each deputy actually employed in attendance upon such court the number of such deputies not to exceed three per day \$3.00."

This section gives the sheriff this three dollars for being in attendance upon courts merely. If requested by the court, he shall perform such duties as he is directed to perform. But if not requested by the court to perform any duties whatever, he may still claim his three dollar fee.

In view of the above general prepositions of law the answer to your questions, in the order in which you ask them, is:

Probate and magistrate courts do not have to be formally opened by the judge or sheriff in order to make their judgments valid.

The three dollar fee allowed sheriffs for attendance upon courts is a statutory fee that can be charged by the sheriff for attendance upon courts when directed by the judge to so attend.

It is not necessary for the magistrate, in having a trial with or without a jury, to formally open his court in order to make his judgments valid, nor for the sheriff or anyone else to do so.

CONCLUSION

It is the conclusion of this Department that probate and magistrate courts do not have to be formally opened by the judge, sheriff or any other official.

Respectfully submitted,

APPROVED:

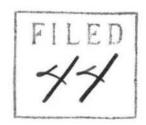
J. E. TAYLOR Attorney, General

HPW + www

HUGH P. WILLIAMSON Assistant Attorney General October 24, 1949

1/9/49

Honorable David E. Impey Prosecuting Attorney Texas County Houston, Missouri



Dear Sir:

Reference is made to your request for an official opinion of this Department, reading as follows:

"Please advise me as to what fee, if any, the Sheriff is entitled for executing a warrant to arrest an alleged insane person under Section 9336, Laws 1945, executed at the same time as the service of Notice of Inquiry as to Sanity."

The warrant of arrest referred to in your letter of inquiry is that issued under the provisions of Section 9336, Missouri R.S.A., permitting the apprehension of alleged insane persons and the holding of such persons in custody pending the adjudication. We note that no provision is contained therein respecting the fees to be charged by a sheriff executing such warrant.

In the premises the rule declared in Smith v. Pettis County, 136 S.W. (2d) 282, would be applicable. In that case the Supreme Court said at 1. c. 285:

"The rule is established that the right of a public official to compensation must be founded on a statute. It is equally established that such a statute is strictly construed against the officer. Nodaway County v. Kidder, Mo. Sup. 129 S.W. 2d 857; Ward v. Christian County, 341 Mo. 1115, 111 S.W. 2d 182. * * *"

Proceedings to inquire into the alleged insanity of a person are civil in nature. We quote from Ex Parte Trant, 175 S.W. (2d) 161, at 1.c. 164:

"A lunacy proceeding is a civil, as distinguished from a criminal proceeding; it

is a proceeding in personam by the state; the public is interested in the welfare of the person alleged to be insane; and the informant who starts the proceeding cannot withdraw the complaint without the consent of the court. State v. Holtkamp, supra. * * *"

We, therefore, must resort to statutes providing for fees of sheriffs in civil cases to determine whether or not such statutes authorize the charge and collection of a fee for executing the warrant of arrest. The fee statute of sheriffs for the service of process in civil cases is found as Section 13411, R. S. Missouri, 1939. Included in said section we find the following:

It is our thought that the warrant referred to in Section 9336, Missouri R. S. A., is comprehended within the allowance for serving a "notice or rule of court," and, therefore, the sheriff is entitled to the fee set out of fifty cents.

CONCLUSION

In the premises we are of the opinion that a sheriff executing the warrant mentioned in Section 9336, Missouri R. S. A., is entitled to a fee of fifty cents for such service.

Respectfully submitted,

WFB/feh

WILL F. BERRY, JR. Assistant Attorney General

APPROVED:

J. E. TAYLOR Attorney General PAUPERS: County court under facts and circumstances stated is obligated to take care of said poor persons notwithstanding the fact he is not an inhabitant of said county.

FILE

January 5, 1949

1-10-49

Honorable Duncan R. Jennings Prosecuting Attorney Montgomery County Montgomery City, Missouri

Dear Sir:

This will acknowledge receipt of your request, which reads as follows:

"On the evening of September 9, 1948, one Carl Ezra Gage was found lying on the shoulder of Missouri State Highway No. 19, near New Florence, Montgomery County, Missouri. This person is without legs. He was apparently a victim of a hit and run driver. He had numerous bruises and his left arm was fractured at the elbow. Our County Sheriff sent this injured party to the Audrain County Hospital for emergency treatment. We have not been able to establish by whom or how this man was injured.

"The said Carl Ezra Gage stated to both the Sheriff and myself that his home was La Grange, Indiana. The Highway Patrol contacted the authorities in La Grange and received information that Gage's family would send for him.

"We have written and telephoned the Sheriff's office in La Grange and have not been favored with a reply. The La Grange County Welfare Department advises, that they are unable to take any action, for the reason that their investigation indicated that the said Carl Ezra Gage had left their County about 17 years ago, and was not a resident of their

County.

"Request advice as to what proceedure we shall take to relieve the County from taking care of this non-resident poor person."

Your request for an opinion under such facts and circumstances is rather unusual and this department has never heretofore rendered an opinion applicable to such conditions.

Naturally if you could determine this party's residence or were able to contact relatives, ordinarily such problems are relatively easy to solve but if you are unable to determine his residence or locate any relatives who are willing to financially care for him then apparently caring for such helpless, indigent person is an obligation to be assumed by your county which unfortunately works a hardship on the county but under such circumstances it leaves you no alternative but to care for him.

A poor person is defined as follows in Section 9591, R. S. Mo. 1939.

"Aged, infirm, lame, blind or sick persons, who are unable to support themselves, and when there are no other persons required by law and able to maintain them, shall be deemed poor persons."

Under Section 9592, R. S. Mo. 1939, an inhabitant for the purpose of said article (article III, chapter 55, R. S. Mo. 1939) dealing with support of the poor is defined as follows:

"No person shall be deemed an inhabitant within the meaning of this article, who has not resided in the county for the space of twelve months next preceding the time of any order being made respecting such poor person, or who shall have removed from another county for the purpose of imposing the burden of keeping such poor person on the county where he or she last resided for the time aforesaid."

Unquestionably this person is not an inhabitant of your county or any other county in this state.

Under Section 9593, R. S. Mo. 1939, the county court is

authorized to support persons entitled to benefits under said article. Notwithstanding the fact that this person is not an inhabitant of your county the General Assembly has vested in the county court authority at all times to grant relief to persons regardless of residence.

Section 9594, R. S. Mo. 1939, reads:

"The county court shall at all times use its discretion and grant relief to all persons without regard to residence, who may require its assistance."

In Scotland County vs. McKee, 168 Mo. 282, the appellate court held that under said statute the county court is not bound to support a poor person who is not an inhabitant of the county but said county court may do so. In a more recent decision of the Supreme Court, State v. Smith, 96 S.W.(2d) 40, 1.c. 41 and 42, the court goes a little farther and states that it is the duty of the county to support the poor who are within its boundaries. However, the authority in support thereof, is apparently based upon Section 9590, R. S. Mo. 1939. Formerly Section 12,950, R. S. Mo. 1929, which provided that poor persons shall be relieved, maintained and supported by the county of which they are inhabitants and also upon public policy and the good of the society in general. In so holding the court said:

"We are of the opinion that it is the duty of a county to support the poor who are within its boundaries. Section 12950, R. S. Mo. 1929 (Mo. St.Ann. Sec. 12950, p. 7474), is as follows: 'Poor persons shall be relieved, maintained and supported by the county of which they are inhabitants.'

'An examination of the Revised Statutes of Missouri 1929 clearly shows that poor relief is a "public purpose" and a governmental duty because by sections 12950 and 12952 (Mo. St. Ann. Sections 12950, 12952, p. 74741), counties are authorized to spend money in support of the poor; by section 9986 (Mo. St. Ann. Sec. 9986 (p. 8022)), a county pauper fund is provided; by section 12058 and 13942 (Mo. St. Ann. Sections 12058, 13942 (pp. 6410,4240)) county poor houses and county hospitals are maintained; Sec. 9697 (Mo. Stat. Ann. Sec. (p. 7349)) gives authority to educate poor 9697 children that are blind or deaf; section 12961 (Mo. St. Ann. Sec. 12961 (p. 7476)) directs the county court to set aside, out

out of its annual revenues, a definite sum for the support of the poor; article 1, chapter 90, creates a state board of charities and defines its functions; section 12930 (Mo.St. Ann. Sec. 12930, p. 7465) requires this board to supervise public relief to the poor. **

The good of society demands that when a person is without means, and unable; on account of some bodily or mental infirmity or other unavoidable cause, to earn a livelihood, " he is entitled to be supported at the expense of the public. "It is immaterial how the alleged pauper is brought into need, as it is the fact or the situation and not the method of producing it that is important." "So the fact that a person's want is the result of gross intemperance does not prevent him from securing relief as a pauper. "An ablebodied man, who can, if he chooses ob-tain employment which will enable him to maintain himself and family, but refuses to accept employment, is not entitled to public relief, though relief may be properly extended to the wives and children of such men." 21R.C.L. 705, 706. It necessarily follows that an able-bodied man, who is unable to obtain employment on account of the economic conditions existing at the time, and who is without means of support, is entitled to public relief. Jennings v. City of St. Louis, 332 Mo. 173, 58 S.W. (2nd) 979, 981 87 A.L.R. 365.

We are unable to find any law in Missouri making it mandatory that a person support his kinsfolk other than, husband must support his wife and minor children. There are some other states that have enacted laws requiring persons related within a certain degree either by consanguinity or affinity to support their relatives when financially able so to do, but in the absence of any statute to that effect in this State, there is no such liability. If you are able to determine the residence of this person, some of his

Hon. Duncan R. Jennings

- 5 -

close relations, or some facts as to how he came to be in your county, it is possible that you might find someone legally responsible for his care, or willing to furnish him assistanct at this time.

CONCLUSION

It is the opinion of this department that it is not mandatory that your county take care of this person, since he is not an inhabitant of your county as defined in Section 9592, supra, however, it is within the discretion of the County Court to care for him if the Court is a mind to do so. Until such time as you are able to determine the residence of this party, or if he has any available finances that could be used for his support, relatives or friends who are financially able and willing to care for him, or who may be legally responsible under the laws of some other state to support him, there is nothing that can be done except for your County Court to exercise its discretion and care for him, or refuse to do so.

Respectfully submitted,

AUBREY R. HAMMETT, JR., Assistant Attorney General

APPROVED:

J. E. TAYLOR Attorney General

ARH:mw

HOSPITALS: COUNTIES: STATE AID: A county in which is located a city which has received state aid for memorial airport is eligible to receive state aid for county memorial hospital if county has not received state aid for county memorial airport.

February 1, 1949

R. J. James, M. D.
Director
Division of Health
State Office Building
Jefferson City, Missouri

FILED 45

Dear Sir:

This is in answer to your letter of recent date requesting an official opinion of this department and reading as follows:

"A question has arisen regarding the eligibility of a county to obtain a \$10,000 state grant for construction of a memorial hospital under a law passed by the 64th General Assembly, Volume II, page 333.

"Senate Bill 192, Laws of Missouri--1945, Page 1315, provide for a state grant for a municipal airport. Section 2, Senate Bill 322, Page 334, Laws of Missouri--1947, provide limitations on the aid to the hospital where the state grant has already been received for an airport.

"Would a county in which a city has been the recipient of state funds for a municipal airport be eligible to receive a state grant to build a memorial hospital?"

Section 1, Laws of Missouri, 1945, page 1315, authorizes cities, towns and counties to purchase sites and construct and operate airfields in such counties or near such cities and towns, and provides that when any city, town or county certifies to the Governor that it has appropriated a specific sum for the purpose of purchasing or constructing an airfield, a like sum not to exceed \$10,000 shall be allotted to said city, town or county after the Department of Resources and Development has certified to the Governor that the airfield is desirable and that the funds proposed are adequate to complete the project.

Section 1, Laws of Missouri, 1947, Volume II, page 333, provides that any county in the state shall be eligible to receive state financial aid upon certification to the Governor by the county court that the county has an adequate sum of money for the purchase or erection and operation of a county memorial hospital or a memorial addition to a county hospital and certification to the Governor by the Director of the Division of Health that the proposed county memorial hospital or addition to the county hospital is in his judgment in the interest of public health and welfare, and that sufficient funds are available to finance the hospital and its operation. The state financial aid is an amount equivalent to the amount actually expended by the county in the purchase or erection of the hospital or an addition to a hospital not to exceed \$10,000.

Section 2 of said act provides that any county which has received any state financial aid, under the provisions of the act first referred to in this opinion, that is, Laws of Missouri, 1945, page 1315, shall not be eligible for state financial aid under this act. The fact that a city in a particular county did receive state aid in the construction of a municipal airfield under the provisions of Laws of Missouri, 1945, page 1315, in no way precludes the county from receiving state aid under the provisions of Laws of Missouri, 1947, Volume II, page 333. The provisions of Laws of Missouri, 1947, Volume II, page 333, in effect provide that a county can receive state aid only for a county memorial hospital or a county memorial airfield, but cannot receive state aid for both. Since there is no prohibition against the receiving of state aid for a county memorial hospital by a county within whose boundaries is located a city which has received state aid for a memorial municipal airport, it is our view that such a county is eligible to receive state aid for a county memorial hospital.

CONCLUSION

It is the opinion of this department that a county in which is located a city which has received state aid for construction of a memorial municipal airport is eligible to receive state aid for a county memorial hospital under provisions of Laws of Missouri, 1947, Volume II, page 333,

provided such county has not received state aid for construction of a county memorial airfield under provisions of Section 1, Laws of Missouri, 1945, page 1315.

Respectfully submitted,

C. B. BURNS, JR. Assistant Attorney General

APPROVED:

J. E. TAYLOR Attorney General INSANE PERSONS: PROBATE COURTS: Insane person admitted to state hospital retains residence had at time of admission.

July 26, 1949

FILED 8/10/4.

Honorable D. R. Jennings Prosecuting Attorney Montgomery County Montgomery City, Missouri

Dear Sir:

Your recent opinion request reads as follows:

"On the 30th day of April, 1940, a certain individual, who was 35 yrs. of age, was residing with her parents in Warren County, Missouri. On said date she was admitted to State Hospital No. One, at Fulton, Mo., as a private patient, upon the certificate of private physicians. She has been continuously confined there since that time. There has been no hearing before or a committment by a County or Probate Court.

"About five years ago the parents moved to Montgomery County, Missouri. The said individual being then confined in the State Hospital. The said individual has never actually lived in Montgomery County.

"The parents have now encountered adverse circumstances and are unable to maintain her in said institution as a private patient. It is their intention to have her committed to State Hospital No. 1, as a County Patient.

"It is my contention that the said individual is not a resident of Montgomery County, but is a resident of Warren County and our Probate Court is without jurisdiction. She was emancipated from her parents at the time she was sent to the said hospital and was a resident at that time. I do not believe that her residence would follow her parents. I am sure

that if in 1940, she had been committed by the County or Probate Court of Warren County as a county patient, the Courts would not hold that her residence would change with her parents."

The individual in question was admitted to the state hospital as a pay patient under authority of Section 9322, R. S. Mo. 1939. She still remains an inmate of this institution, and, we assume, it shall be found that she has not sufficient estate to support her therein. She may therefore be made a county patient upon order of the probate court of the proper county, as provided in Section 9346, Mo. R.S.A. which reads as follows:

"If the probate court of the proper county shall so order, the clerk thereof shall transmit to the superintendent a certificate, under his official seal, setting forth that any patient in a state hospital has not estate sufficient to support him therein. Upon the receipt of such certificate by the superintendent, such person shall be a county patient of such county, and shall be supported by such county, as provided by this article in the cases of poor patients."

It is the probate court of the county of residence that is the proper probate court to issue this order. Section 9328, Mo. R. S. A., provides that the probate courts of the several counties shall have power to send to a state hospital such of the insane poor of their respective counties as may be entitled to admission thereto. The form provided for by Section 9335, Mo. R. S. A. to be used in proceedings for admission of insane poor persons by probate courts requires an allegation that such insane poor person is a resident of that county in which the proceedings are held. Section 9346, supra, supplements Section 9328, and is governing in those cases where the insane poor person is already an inmate of a state hospital. It therefore follows that the probate court of the county of residence is the proper probate court to issue the order provided for in Section 9346, supra.

The individual in this instant case was thirty-five years of age at the time of her admission to State Hospital No. One. She was an adult at the time of the onset of her insanity, and had been fully emancipated from her parents. Therefore she was at the time of her admission a resident in her own right of Warren County. This residence was not lost or changed when she was admitted to the state hospital. An insane person does not become

a resident of the county in which is situated the state hospital to which he is admitted; see Ex parte Zorn, 145 S.W. 62, 241 Mo. 267. The individual in question remains a resident of Warren County after her admission to the state hospital. Furthermore, an insane person is not mentally capable of making a change in residence; State ex rel. Taylor v. Wurdeman, 108 S.W. 144, 129 Mo. App. 263.

Nor was the daughter's residence changed by operation of law when her parents moved to Montgomery County. She had been emancipated from them upon becoming an adult. There has never been any guardianship proceedings, nor any court proceedings whatsoever. Therefore, the individual in question, being a resident of Warren County in her own right, retained such residence upon admission to the state hospital. There has been no change of residence by operation of law, and the insane individual was incapable of effecting a change of residence.

Conclusion

Therefore, it is the opinion of this department that an adult person who becomes insane and is admitted to a state hospital retains as his residence that county of which he was a resident prior to admission. Nor does a mere change of residence effected by the parents of such individual, with whom the latter had resided, operate as a change of the insane individual's residence. The probate court of the county of which the insane person was a resident prior to admission is the proper court to make the order provided for by Section 9346, Mo. R.S.A.

Respectfully submitted,

RICHARD H. VOSS Assistant Attorney General

APPROVED:

J. E. TAYLOR Attorney General

RHV:mw

MOTOR WEL USE TAX:

Counties are not liable for payment of the Motor Fuel Use Tax for fuel consumed by motor vehicles used in repairing and maintaining county roads.

October 24, 1949

335

October 24, 1949

Mr. Duncan R. Jennings Prosecuting Attorney Montgomery County Montgomery City, Missouri



1/8/49

Dear Mr. Jennings:

We have your recent letter requesting an opinion regarding the liability of a county of the third class under the Motor Fuel Use Tax, Sections 8442.1 to 8442.15, inclusive, Mo. R.S.A., as amended by Laws of 1943, page 657. The pertinent part of your opinion request is as follows:

"Request your ruling as to whether or not a County of the Third Class such as the County of Montgomery is required to pay the 'Motor Fuel Use Tax' under Sections 8442.1 to 8442.15, inclusive, Mo. R.S.A., as amended Laws 1943. p. 657.

"The only fuel oil used by Montgomery County is in two tractors and one maintainer. This machinery is used only for repair and maintenance of county roads and when moved from one site to another they are transported on a trailer."

Your opinion request presents the following question: Is a county required to pay the Motor Fuel Use Tax on fuel consumed by motor vehicles used solely for the repair and maintenance of county roads?

In order to answer the question directly presented by your opinion request it becomes necessary for us to construe the statute here involved, keeping in mind the intent of the Legislature at the time it enacted the said statute. A primary rule in the construction of statutes was stated by the Supreme Court of Missouri in the case of American Bridge Co. v. Smith, 179 S.W. (2d) 12, 1.c. 15, as follows:

"The primary rule of construction of statutes is to ascertain the lawmakers' intent, from the words used if possible; and to put upon the language of the Legislature, honestly and faithfully, its plain and rational meaning and to promote its object. * * * *!"

Following the above-quoted rule, we refer to the act as a whole and find that the Legislature expressed its intent and the purpose of the act in plain and unequivocal language in Section 8442.2, Mo. R. S. A., to be for the "purpose of providing revenue to be used by this state to defray in whole or in part, the cost of constructing, widening, reconstructing, maintaining, resurfacing, and repairing the public highways, roads, and streets of this state and the cost and expense incurred in the administration and enforcement of this act and for no other purpose whatsoever."

Section 8442.3, supra, designates the classes of persons who shall pay the said tax and the circumstances which must exist before such persons become liable for the payment of said tax. We quote therefrom:

"There is hereby levied and imposed an excise tax * * * on all users of fuel upon the use of such fuel by any person within this state only when such fuels are used in an internal combustion engine for the generation of power to propel motor vehicles upon the public highways of this state, * * * *

Hence, before any "person or persons" become liable for payment of the said tax it must be shown that said person or persons are "users" of fuel and that such fuel is "used" in an internal combustion engine for the purpose of power to propel motor vehicles upon the public highways of this state. Section 8442.1, as amended by Laws of 1943, page 657, states the following definitions:

"'Person' shall mean and include natural persons * * * firms * * * counties * * * The use of the singular number shall include the plural number.

"'Use' shall mean and include the consumption of fuel by any person in a motor vehicle for the propulsion thereof upon the public highways of this State.

"'User' shall mean any person who uses or consumes fuel within this state in an internal combustion engine for the generation of power to propel motor vehicles upon the public highways of this state."

The meaning of these parts when construed as a whole is that all of those designated by the statutes, including counties of all classes, using fuel to propel motor vehicles over the public highways of this state shall pay the Motor Fuel Use Tax.

Section 39(10) of Article III of the Constitution of Missouri provides:

"The general assembly shall not have power:

"(10) To impose a use or sales tax upon the use, purchase or acquisition of property paid for out of the funds of any county or other political subdivision."

This provision of the Constitution, however, does not prohibit the imposition of a Fuel Use Tax upon political subdivisions because such a tax is not upon the property of a county or the use of such property, but rather upon the privilege of using the highways. This contention is supported by an opinion previously rendered by this office to Mr. George Metzger, State Inspector of Oils, dated June 6, 1945.

Having then determined that the Motor Fuel Use Tax as applied to counties is constitutional, we will proceed to the construction of this statute and similar ones of other states. Said statute has not, in such a way as to answer your question, been construed by the courts of this state, so an examination of the decisions of other states will prove most helpful in answering the question.

In People v. Board of County Commissioners of Weld County, 90 Colo. 592, the statute in question provided for an Excise Tax on all fuel used in propelling motor vehicles on public streets or highways. That statute is in many respects similar to our own. It is set out on page 489 of the 1929 Session Laws of Colorado, and provides, in part, as follows:

"An excise tax of four cents per gallon is hereby imposed and shall be collected on all motor fuel sold, offered for sale or used in this state for any purpose whatsoever; * * *

"Every person who shall use in this state for propelling a motor vehicle on the public streets or highways, any motor fuel

The word "person" is defined in said statute, and the definition specifically includes counties. The court, in construing the above statute, said, in part, as follows:

" * * * the questions for determination here are: (1) * * * whether the county is liable to the state for gasoline which it uses for propelling trucks and tractors in construction and maintenance of highways * * *

"We think the county is right in its contention. * * * that is, gasoline used by a county or municipality in the construction, maintenance and repair of its highways to fit them for use as such, * * * or, to use the language of our statute, 'is not being used in propelling motor vehicles upon a highway.' All of the gasoline so consumed was used directly or indirectly, and exclusively for, and in aid of, construction, maintenance and repair of public highways, and the use is not a taxable one."

In Allen v. Jones, 47 S. D. 603, the court, in construing a South Dakota Fuel Tax statute, stated, in part, as follows:

"The meaning of this section is that a purchaser of gasoline who has paid the two-cent tax thereon is entitled to a return thereof on all gasoline used for 'commercial purposes,' except such as is used in motor vehicles 'operated or intended to be operated in whole or in part upon any of the public highways of the state.' The only question then to be

determined is whether a traction engine used in the construction, repair, or maintenance of a highway is being 'operated' upon a highway within the meaning of this statute."

The court concluded:

" * * * A tractor being used in the construction of a highway is not being 'operated upon' a highway in any proper sense whatever."

In Oswald v. Johnson, 210 Cal. 321, the court construed the California statute as follows:

"The Gasoline Tax Act was intended to provide for a license tax on motor vehicle fuel used on public highways of the state " " " When, as here, the rollers and tractors are being used in such construction, the public highway is not being 'operated upon' in the sense intended by the statute."

In Hallett Const. Co. v. Spaeth, 4 N.W. (2d) 337 (Minn.), the following language appears:

" * * * it would be absurd to conclude that it (the Legislature) intended to single out gasoline used in road-building machinery as the only subject outside of motor vehicles upon which a tax should be imposed. Since the tax is imposed on the theory that it is compensation to the state for the use of its highways, the reason for exempting machinery used to improve or construct highways from a tax levied on vehicles which wear out the highways is apparent and logical. * * *"

Section 8442.1, supra, defines "public highways" as follows:

"'Public Highways' shall mean and include every way or place, of whatever nature, generally open to the use of the public as a matter of right for the purpose of vehicular travel and notwithstanding that the same may be temporarily closed for the purpose of construction, reconstruction, maintenance or repair."

The sole purpose of this broad and inclusive definition of a public highway appears to be to make it quite clear that none of the contemplated users of fuel should escape the tax because some portion of the highway over which they pass might be undergoing repair at some near by or even remote point. The Legislature undoubtedly foresaw that if the law were not explicit in this respect that many users of the highway would claim that, since they were unable to traverse the whole distance of the highway because at some point it was temporarily closed for repairs, said road had lost its character as a public highway. That the Legislature intended by this definition to tax those who repair and construct a highway, so as to raise funds for the repair and construction of highways, would be an irrational and strained interpretation and totally out of harmony with the stated purpose of the taxing act and clearly in violation of the rule stressed in American Bridge Co. v. Smith. supra.

To sum up, then, the statute imposing a tax on users of fuel upon the use of such fuel for the purpose of propelling vehicles upon the public highways was not intended to include fuel used in vehicles employed in the repair and maintenance of public highways, and the cases from other states are explicit upon this point. The broad definition given to public highways does not lead to the conclusion that repair and maintenance vehicles were intended by the act, but on the contrary, and following the trend of leading cases on statutory construction, we must deduce from reading the whole act, including the stated purpose thereof, that the Legislature meant that vehicles used in repair and maintenance were to be excluded.

CONCLUSION

It is, therefore, the opinion of this department that a county of the third class is not required to pay the Motor Fuel Use Tax for fuel used or consumed by an internal combustion engine in the repair and maintenance of county roads.

Respectfully submitted,

APPROVED:

H. JACKSON DANIEL Assistant Attorney General

J. E. TAYLOR Attorney General ADMINISTRATION AND: FINAL SETTLEMENT: NOTICE:

Notice of appointment of administrator and of final settlement should appear in four successive weekly insertions in paper.

July 24, 1949



1/28/49

Honorable O. A. Kamp Judge of the Probate Court Montgomery City, Missouri

Dear Sir:

This department is in receipt of your recent request for an official opinion upon the following matter:

"I would like to have an opinion from your department, as to how many weekly issues the Administrator's notice provided for in Section 75 and the final settlement notice provided for in Section 229, R. S. Mo. 1939, should be run. There is some contention that the final settlement notice must run for five weeks prior to the opening of the term, in order to have the full 4 week's (28 days) notice. I will appreciate your opinion on this matter."

Section 75, Mo. R.S.A. 1939, states:

"At the time of the appointment of any administrator or executor of an estate, the court, or judge or clerk making such appointment shall require such administrator or executor to sign a notice prepared and attested by the judge or clerk of such court, with its seal affixed, which notice the judge or clerk of said court shall within ten days after the date letters are granted on such estate, cause to be published in some newspaper published in the county where letters of administration have been granted, and if no paper is published in such county, then in a paper published in any other county in the state nearest to the county where such letters of administration have been granted, once a week for two

consecutive weeks in all counties or cities having over six hundred thousand at the last preceding federal census and in all other counties once a week for four consecutive weeks, which said notice shall state that letters testamentary or of administration have been granted to said executor or administrator, stating the date, and requiring of persons having claims against the estate to exhibit them for allowance to the executor or administrator within six months after the date of granting said letters, or they may be precluded from any benefit of such estate, and that if such claims be not exhibited within one year from the date of the granting of said letters, they shall be forever barred: * * * " (Underscoring ours.)

In regard to the above we direct your attention to the case of Bolz Cooperage Corporation v. Beardslee, 245 S.W. Oll. This was a case in which the court was construing the above section. The court in its opinion states the situation thus:

"* * *After setting forth a detailed statement of the account, the demand recites that the letters of administration upon said estate were granted by the said common pleas court to respondent, Annie G. Beardslee, on the 8th day of June, 1918; that on July 25, 1918, respondent as said administratrix, filed with the clerk of said court the publisher's affidavit showing publication in due and regular form of the notice of the granting of said letters, showing that such publications were made on June 14, 1918, and once each week thereafter for three consecutive weeks. * * *"

The court held that under the above fact situation the notice was good. It seems to us that this is a clear construction of this section and that it needs no further elaboration.

Section 229, Mo. R.S.A. 1939, states:

"At the first regular term of the court after the expiration of one year from the date of granting

of the first letters on the estate, as required by this chapter, unless further time has been given by the court by an order entered of record every executor and administrator shall make final settlement, having first published once a week for two consecutive weeks in cities or counties having a population of over six hundred thousand as shown by the last preceding federal census and in all other counties once a week for four consecutive weeks prior thereto in some newspaper published and circulated in the county where such settlement is to be made, if there be one, and if there be none published in such county, then by ten printed handbills put up in ten public places in said county, a notice to all creditors and others interested in the estate that he intends to make such final settlement at the next term of the court. If any executor or administrator fail to so advertise and make such final settlement at such term or when required by the court at any time thereafter, he shall be proceeded against as for his failure to make annual settlements, unless for good cause shown the court shall continue same. If the first insertion of the publication required by section 75 is not published within ten days from the date of the granting of the letters, then the one year above mentioned shall begin to run from the date of the first publication of such notice: Provided, that where publication is made in a daily newspaper, publication for each week after the first shall fall on the corresponding day of the week as did the first publication."

In connection with the construction of the above section we call your attention to the case of Ratliff v. Magee, 165 Mo. 461, in which the court makes the following statement in regard to the construction of our Section 229:

"The statute we are now to construe (our 229) directs that an administrator, at the first regular term of the court after two years from the date of publication of notice of his letters, shall make final settlement, ' having first published for four weeks prior thereto, in some newspaper published and circulated in the county, when such settlement is to be made, if there be

one, and if there be none published in said county, then by ten printed handbills put up in ten public places in such county, a notice to all creditors and others interested in the estate that he intends to make such final settlement at the next term of the court. (Sec. 232, R. S. 1899.) As in compliance with this requirement, the administrator, in the case at bar, published the notice March 24, March 31, April 7 and April 14. The first day of the term of court to which the notice was addressed was May 8. Thus between the date of the first publication and the first day of the term, there was a period of more than four weeks, but between the date of the last publication and the first day of the term was a space of only twenty-four days. To hold the notice to be not sufficient in this case we must say that the statute requires not only that it be continued through a period of four weeks but also that there must be a space of four weeks between the last insertion in the newspaper, and the first day of the term of court, to which it is addressed, that it must be a notice continuing four weeks, and ending four weeks before the term, embracing from first to last, eight weeks. That would be a very material judicial amendment to the statute. The statute only calls for a publication to run through a period of four weeks from first to last before the first day of the term of court. It will be noticed that in case there is no newspaper in the county, then the statute requires the publication for four weeks to be by posting printed handbills in ten public places in the county. There is the very same period of time required when handbills are resorted to that there is when a newspaper is employed, and we should have to say that there must be eight weeks between the first posting of the handbills and the first day of the term of the court, if we say that the law requires that space of time between the first insertion of the notice in the newspaper and the first day of the term. The law does not mean that. If it is a case for handbills, it is sufficient if they are posted and so remain four weeks, or twenty-eight days before the first day of the term, and it is so if a newspaper is used.

"The notice of final settlement in this case was sufficient and the discharge of the administrator is res adjudicata."

From the above it appears that the requirements of the statute are satisfied if the period of time clapsing between the publication of the first notice and the opening of the term of probate court is no less than 28 days, which period of notice can be effected by four insertions in the paper.

CONCLUSION

It is the conclusion of this department that the number of issues of an administrator's notice provided for in Section 75 and the final settlement notice provided for in Section 229, R. S. Mo. 1939, are four.

Respectfully submitted,

HUGH P. WILLIAMSON Assistant Attorney General

HPW:mw

APPROVED:

J. E. TAYLOR Attorney General EVIDENCE: A person who is in a condition capable of giving ADMISSIBILITY:consent to the taking of a sample of his blood for the purpose of testing it for alcoholic content, where a sample of blood is taken and is duly tested by an accredited chemist, chemist may testify in court regarding his findings with respect to alcoholic content in blood tested.

May 9, 1949

FILED 48

Honorable W. Don Kennedy Prosecuting Attorney Nevada, Missouri

Dear Sir:

This office is in receipt of your recent request for an official opinion upon the following state of facts:

"A man is injured in an auto accident in which his wife is killed. The man is taken to the hospital and given emergency treatment, including a hypodermic, by a Dr. Allen Shortly thereafter, the Highway Patrolmen arrive and question him about the accident. He is somewhat confused about the details of the accident, and his speech somewhat incoherent and hesitant. The patrolmen ask him if he will consent to a blood test to determine alcoholic content, and advise him of his right to refuse. He consents; Dr. Allen who has left the hospital and has gone home, is called back by the patrolmen, and draws the blood in the presence of the patrolmen and hands the tube to them. They mail it to the laboratories in Jefferson City, where it is analyzed and it is determined the blood shows a high percent of alcoholic concentration. Subsequently, the injured man is arrested on charges of manslaughter. May the chemist who analyzed the blood testify as to the results of the test on the trial?

"The questions involved, I think are these:

- "(1) Assuming his ability to consent or refuse consent at the time the test was taken, can he object on the ground of self-incrimination?
- "(2) Even assuming inability to consent, is there valid objection on the ground of self-incrimination-as if he had been unconscious?

"(3) Does it make any difference that the blood was drawn by the same Doctor who had treated him a few minutes before? Is the physician's privilege involved?"

It is our opinion that the chemist who analyzed the blood may testify regarding the alcoholic content which he found therein.

According to the statement this subject was told by the patrolmen that a sample of his blood was wanted for the purpose of being tested for alcoholic content, with the plain implication that if alcohol was found therein this fact would be used in evidence against him. You state that he was told further that he could refuse to give his consent to this blood test if he desired to do so but that he did so consent.

You assume in (1) that at the time when he gave his consent he was in such physical and mental condition as to be fully capable of consenting or refusing to consent; that he was fully at himself, was capable of judgment, and was capable of rationalizing upon this matter. At this time he could have refused consent, on the legal ground that he could not be compelled to incriminate himself. The original basis of this right is to be found in the fifth amendment to the Federal Constitution which states:

"No person shall be held to answer for a capital or otherwise infamous crime unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property without due process of law; nor shall private property be taken for public use without just compensation."

The Constitution (1945) of Missouri reaffirms the same right in Article I, Section 19, which states:

"That no person shall be compelled to testify against himself in a criminal cause, nor shall any person be put again in jeopardy of life or liberty for the same offense, after being once acquitted by a jury; but if the jury fail to

render a verdict the court may, in its discretion, discharge the jury and commit or bail the prisoner for trial at the same or next term of court; and if judgment be arrested after a verdict of guilty on a defective indictment or information, or if judgment on a verdict of guilty be reversed for error in law, the prisoner may be tried anew on a proper indictment or information, or according to the law."

This legal principle finds further expression in Section 4082, R. S. Mo. 1939, which states:

"If the accused shall not avail himself or herself of his or her right to testify, or of the testimony of the wife or husband, on the trial in the case, it shall not be construed to affect the innocence or guilt of the accused, nor shall the same raise any presumption of guilt, nor be referred to by any attorney in the case, nor be considered by the court or jury before whom the trial takes place."

There are numerous Missouri cases substantiating this legal principle. We call your attention to, In re West, 348 Mo. 30, in which the court held: (1.c. 31)

"* * *it is well established in this state that the immunity afforded a witness by the Constitutional provisions is broad enough to protect him against self-incrimination before any tribunal in any proceeding; it is not merely to shield a witness at his final trial but extends its protection in preliminary proceedings. * * *"

The case of State v. Conway, 348 Mo. 580, 1.c. 588, holds that:

"* * *the privilege against self-incrimination is a part of the Bill of Rights, a personal privilege, guaranteed by the Constitution in unambiguous language, and, the statutory protection against comment, by court or counsel, is a plain legislative mandate, the underlying policy of which is and was for the draftsman of the acts and not the courts. Secondly,

since it is a right and a privilege granted the citizen he should be permitted to exercise it with complete freedom and not at the peril of being impeached by it in the event that he should ever attempt to assert his innocence.

However, defendant may waive this right by taking the witness stand and testifying, or as in the instant case, by consenting that a sample of his blood be taken for the purpose of testing it for alcoholic content. In regard to this we again call your attention to State v. Conway, quoted above, which, upon this point of waiver, states:

"The limitation on the protection as to preliminary or collateral proceedings being that if a defendant voluntarily testifies at a coroner's inquest, or other proceedings, he thereby waives the privilege against self-incrimination."

In State v. Graves, 352 Mo. 1102, the court said: (1.c. 1144)

"Looking now to the constitutionality of these statutes, it is to be noted the Clinton case pointed out that the accused testifies, or not, at his own option; and that the statute, now Sec. 4081, is an enabling Act, since the accused would have been disqualified as a witness under the common law. The decision further quoted from a New York case that the defendant's becoming a witness (italics ours): 'was a voluntary act, and when he made himself a witness, under the privileges of the Act, he waived the constitutional protection in his favor and subjected himself to the peril of being examined as to any and every matter pertinent to the issue.' * * "

This view is sustained in State v. Tyler, 349 Mo. 167, and many others.

When, in the instant case, by consenting that a sample of his blood be taken for testing, this subject waived his right to refuse to consent on the ground of self-incrimination, and a chemist who tested the blood thus taken could testify as to its alcoholic content.

In respect to (2) it follows from our reasoning in the above, (1), that if the subject was not in a condition (because of his injury) to give consent, the chemist could not testify if the defendant objected to the introduction of his evidence on the theory that it was self-incrimination without consent.

In respect to (3) there is here no element involved in confidential or privileged communication between the doctor and patient. And even if there had been such a relationship after the subject was treated for his injury and before the sample of blood was taken for testing, it was waived by the consent of the subject that his blood be taken for the purpose aforesaid.

Although not embraced in your questions we may call attention to the fact that at the trial of his case the defendant may object to the introduction of any testimony by the chemist on the ground that he, the defendant, at the time he consented that his blood be taken, was in such condition, as a result of his injury, that he was not capable of giving consent. In that case, which you should anticipate by endorsing on your information and by subpoening all of the persons who were present before, at the time of, and after the giving of consent by this subject, you would put these witnesses on the stand and have them testify regarding the condition of this subject before, at the time of, and immediately after he gave his consent, as to his general condition, the apparent coherence of his thought and mental clarity and regarding all of those matters touching upon his capacity to give consent.

CONCLUSION

It is the conclusion of this department: first, that in a situation in which a person is in a condition capable of giving consent to the taking of a sample of his blood for the purpose of testing it for alcoholic content, and where a sample of blood is taken and is duly tested by an accredited chemist, that this chemist may testify in court regarding his findings with respect to alcoholic content in the blood tested. Second, it is the conclusion of this department that if the above mentioned person is in such a condition by reason of injuries as not to be able to give consent, that the taking of his blood and the testing of it for alcoholic content would be a violation of his right against self-incrimination, and that a chemist making a test of his blood under such circumstances would not be permitted to testify regarding alcoholic content. Third, it is the conclusion of this department that in the above fact situation there is no element involved of confidential or privileges communication between the doctor and the patient, but that even if there had been such a relationship established after the patient was treated for his injury and before the sample of blood was taken for testing, assuming that he gave

consent and was in a condition capable of giving consent, he waived the privileged communication by giving consent that a sample of his blood be taken for the purpose aforesaid.

Respectfully submitted,

HUGH P. WILLIAMSON Assistant Attorney General

APPROVED:

J. E. TAYLOR Attorney General LIBRARIES:

Equalization grants should be made on a population basis to county or regional libraries in all districts in which a one mill or more tax does not yield a dollar per capita to said libraries.

June 13, 1949

Miss Janice Kee Acting State Librarian State Office Building Jefferson City, Missouri



Dear Miss Kee:

This is in reply to your request for an opinion, which request reads as follows:

"Section 14736a, Laws of Missouri, 1945, page 1132, provides that moneys appropriated for state aid to public libraries may be used for 'equalization grants on a population basis to county or regional libraries in all districts in which a one-mill or more tax does not yield a dollar per capita to said libraries.'

"May we have your opinion as to the basis of such 'equalization' grants.

"Attached is a chart which lists all county library districts in this state which, at the present time, have a one-mill tax, but the yield is not a dollar per capita. No county library district in this state has the maximum of two mills for library purposes."

Section 14736a, Laws of Missouri, 1945, page 1134 (Section 14736a, Mo. R.S.A.), reads as follows:

"The General Assembly may appropriate moneys for State Aid to Public Libraries, which moneys shall be administered by the State Librarian with the assistance of the State Library Advisory Board. At least 50 per cent of the moneys appropriated for state aid to public

libraries shall be apportioned to all public libraries established and maintained under the provisions of the library laws or other laws of the state relating to libraries. The allocation of such moneys shall be based on an equal per capita rate for the population of each city, village, town, township, school district, county, or regional library district in which any such library is or may be established, in proportion to the population according to the latest Federal Census of such cities, villages. towns, townships, school district, county or regional library districts maintaining tax supported public libraries. Provided, that no grant shall be made to any public library if the rate of tax or the appropriation for said library should be decreased below the rate in force at the time of the enactment of this bill into law and provided further after January 1. 1949, grants shall be made to any public library, according to two alternate stand-ards: (1) to any public library in which the tax rate is one-half or more of the maximum by law; or (2) to any public library for which the tax income yields one dollar or more per capita for the previous year according to the population of the latest Federal Census. The librarian of such tax supported library together with the treasurer of such library shall certify to the State Librarian the annual tax income and rate of tax or the appropriation of said library on the date of the enactment of this bill, and of the current year, and each year thereafter, and the State Librarian shall certify to the Comptroller for his approval the amount to be paid to each library and warrants shall be issued for the amount allocated and approved. The balance of said moneys shall be administered and supervised by the State Librarian to provide establishment grants on a population basis to newly established county or regional libraries and equalization grants on a population basis to county

or regional libraries in all districts in which a one-mill or more tax does not yield a dollar per capita to said libraries, and provided further that only a library in a municipality, city, county, region, school district or other library district serving 5.000 or more population established by law after January 1, 1947, shall receive grants in aid. Newly established libraries and libraries in which a one-mill tax does not yield a dollar per capita shall certify through the legally established board and the librarian of such library to the State Librarian the fact of establishment, the rate of tax, the assessed valuation of the library district and the annual tax yield of such library. The State Librarian shall then certify to the Comptroller for his approval the amount of establishment grant or equalization grant to be paid to such libraries, and warrants shall be issued for the amount allocated and approved. sum appropriated for such state aid to public libraries shall be separate and apart from any and all appropriations made to the State Library. The State Librarian with the State Library Advisory Board may make such by-laws, rules and regulations in compliance with the provisions of the sections which are deemed necessary for the administration and allocation of such moneys." (Underscoring ours.)

Under the above section, 50 per cent of the moneys appropriated for state aid to public libraries is allocated to libraries according to two alternate standards: (1) to any public library in which the tax rate is one-half or more of the maximum by law, or (2) to any public library for which the tax income yields one dollar or more per capita for the previous year according to the population of the latest Federal census. The other 50 per cent of said moneys goes for establishment grants and equalization grants.

The problem for our consideration is: Was it the intent of the Legislature, when providing for the allocation of the equalization grants, to give moneys to every county or regional

library in which a one mill or more tax does not yield a dollar per capita, or was it the legislative intent to allocate the equalization grants only to certain counties within that classification?

The word "equalize" is defined as follows: "To make equal; to cause to correspond, or be like, in amount or degree as compared with something." Wells Fargo and Company v. State Board of Equalization, 56 Colo. 194, 196; Los Angeles County v. Ransohoff, 74 P. (2d) 828, 830, 24 Cal. App. (2d) 238.

You will note in the underlined portion of Section 14736a, supra, that the Legislature uses in the classification phrase the word "all," indicating that it was the legislative intent that every district in which a one mill or more tax does not yield a dollar per capita should share in the equalization grants on a population basis. We believe it was the legislative intent to attempt an equalization between those counties in which a one mill tax does not yield a dollar per capita and those counties in which a one mill tax does yield a dollar per capita. We do not believe it was the legislative intent that the first-named counties above should be equalized within their classification, but that the state aid provided thereby should go to all such counties on a population basis.

Conclusion.

Therefore, it is the opinion of this department that the statutory phrase, "equalization grants on a population basis to county or regional libraries in all districts in which a one-mill or more tax does not yield a dollar per capita to said libraries," means that the moneys appropriated should be allocated on a population basis to every such county or regional library which comes within that classification.

Respectfully submitted,

APPROVED:

JOHN R. BATY Assistant Attorney General

J. E. TAYLOR Attorney General

JRB:ml

COUNTY COURTS: CLOSING PUBLIC ROADS: A county court may order a public road vacated upon a finding that no necessity for such road exists.

July 12, 1949



Honorable Robert G. Kirkland Prosecuting Attorney Clay County Liberty, Missouri

Dear Sir:

This department is in receipt of your recent request for an official opinion upon the following matter:

"Does the county court have authority under the new Constitution and the recent cases to vacate previously existing public roads upon a finding of no necessity for same?"

On May 13, 1949, the Missouri Supreme Court rendered an opinion in the case of State ex rel. Lane v. Pankey, et al., in which it ruled upon the powers of a county court to establish or change the course of a public road. In that opinion the court stated:

"The new Constitution, as construed in the Rippeto (Rippeto et al v. Thompson, 216 S.W. (2d) 505) case and as we now construe it, invalidates no provision of existing statutes relating to the authority of county courts over public roads except such as purport to authorize the county court to exercise judicial power. A county court can no longer adjudge the compensation to be paid for lands to be taken for road purposes nor render judgment divesting title from the owners thereof. But such court may take all statutory steps to determine the necessity, location, width and type of construction of public county roads, to determine whether same shall be constructed in whole or in part at county expense, and, when title has been legally acquired, to perform the administrative functions of supervising the construction and maintenance of such roads.

"County courts may acquire the right-of-way for such roads by purchase or donation, but, if land owners are unwilling or unable to convey, the necessary right-of-way can be acquired only by condemnation proceedings in a tribunal having the necessary juris-diction. Section 8486, Revised Statutes Missouri, 1939, (Mo. R.S.A.) and Laws of 1945, page 1469, Section 2518, (Mo. R.S.A.) expressly authorize a county court to institute such proceedings in a circuit court and provide a speedy and expeditious method of acquiring the necessary land for road purposes."

It will be observed that in the above the court states that a county court may determine the necessity for a public road, its location, and the type of road to be built; that it may acquire the necessary land by purchase or donation, and may then supervise the construction and maintenance of such road. The court further says that the new Constitution, as construed in the Rippeto case and as it is construed in the instant case, "invalidates no provisions of existing statutes relating to the authority of the county courts over public roads, except such as purport to authorize the county court to exercise judicial power."

The court further states that county courts may do all things necessary to opening or changing the course of a public road except that "a county court can no longer adjudge the compensation to be paid for lands to be taken for road purposes nor render judgment divesting title from the owners thereof."

From the above language of the Supreme Court it would seem to be its opinion that no step in the opening or changing the course of a public road entails the exercise of judicial power except that of adjudging the compensation to be paid for lands taken for road purposes, and rendering judgment divesting title from the owners thereof. Since this is the case, and since the closing of a public road does not entail the adjudgment of compensation to be paid a landowner nor a judgment divesting a landowner of title, it would appear that the closing of a public road is not, in the opinion of the Missouri Supreme Court, a judicial act. Furthermore, it will be remembered that in the Lane case the Supreme

Court stated that a county court could determine when the necessity for opening a public road arose. It would seem, inferentially, that county courts would have equal power to determine the necessity of closing a public road. Furthermore, in the Lane case the Supreme Court states that no provision of existing statutes relating to the authority of county courts over public roads has been invalidated except such as purport to authorize county courts to exercise judicial power. The "existing statutes" referred to do give a county court power to close a public road. Therefore, in view of the fact that the Lane case holds, as it seems to us it does hold, that the only act of a county court in opening or changing the course of a public road which is judicial, and therefore beyond its power, is that of fixing the value of land to be taken for road purposes, and entering a judgment divesting the owner of title, and in view of the further fact that the closing of a public road does not entail the exercise of this power, it is the opinion of this department, that under the holding in the Lane case, a county court does have authority to vacate and close a public road upon a finding of no necessity for keeping the aforesaid road open.

CONCLUSION

It is the conclusion of this department that a county court may order a public road vacated upon a finding that no necessity for such road exists.

Respectfully submitted,

HUGH P. WILLIAMSON Assistant Attorney General

APPROVED:

J. E. TAYLOR Attorney General

HPW:mw

HOSPITAL: Pay patients cannot be evicted from state

INSANE: hospital to make room for indigent insane.

October 15, 1949

19/19/49

Hon. Robert G. Kirkland Prosecuting Attorney Clay County Liberty, Missouri



Dear Mr. Kirkland:

We have your recent letter requesting an opinion from this department, which reads as follows:

"Assuming that all the provisions of sections 9321, ff., R. S. Mo. 1939, as amended in 1945, have been followed and carried out according to both the procedural and substantive law by the various county officials and the Probate Court, can the officials of a state hospital for indigent insane refuse to accept a poor patient on the ground that the hospital is full, when the patient has been heretofore adjudged insane and indigent and ordered committed to the institution by the Probate Court, and when there are in the hospital a number of pay patients, or must the officials of the hospital receive the indigent patient under the order of commitment?"

We understand the substance of your question to be whether or not a state hospital must accept an indigent insane patient who has been properly committed, although the admittance of the former would necessarily result in the eviction of a paying patient because the hospital is full. Article 2, Section 9322, R. S. Mo. 1939, is as follows:

"Pay patients, or those not sent to the hospital by order of the court, may be admitted on such terms as shall be by this article and the by-laws of the hospital prescribed and regulated."

Section 9330, id., is as follows:

"The indigent insane of this state shall always have the preference over those who have the ability to pay for their support in a state hospital; and if there are not provisions in the state hospitals for the accommodation of all the insane persons in the state, then recent cases of insanity, by which term are meant cases of less than one year's standing, shall have preference over cases of more than one year's standing: Provided, no county shall have in the institution more than its just proportion, according to its insane population."

(Underscoring ours.)

Section 9321, Laws of Missouri, 1945, page 906, provides, in part, as follows:

"Persons afflicted with any form of insanity shall be admitted into the hospitals for the care and treatment of same. Any patient so admitted may be discharged or paroled whenever in the judgment of the Superintendent and his staff such person should be discharged or paroled. The decision of the Superintendent and his staff on such matter shall be final * * *"

Section 9330, supra, which in its general wording appears to be controlling in your problem, first became law in 1909, but, in spite of its lengthy tenure, has never been construed by the courts of this state. Said section states that the indigent insane shall have "preference" over those able to pay. Does this mean that paying patients must give way completely, i.e., leave the hospital if the admission of an indigent insane is sought, or merely that if there are two insane persons applying for admittance, one indigent and the other solvent, that the former shall be admitted first?

"'Preference' means the choice of one thing rather than another." Keller v. State, 31 S.E. 92.

"The provision of Quota Act 1921 * * * that in the enforcement of the quota provision of the act 'preference shall be given so far as possible to the wives, parents, brothers * * * of aliens now in the United States who have applied for citizenship, means only that, if the quota from a country has not been filled, those so entitled to preference, if otherwise qualified, shall first be admitted." (Underscoring ours.) United States v. Curran, 299 Fed. Rep. 200, 214.

The instant section makes a definite rule in the event a hospital is full, "if there are not provisions in the state hospitals for the accommodation of all * * *," but goes on to provide merely that the most recent cases shall be preferred, thus conspicuously omitting mention of the preference of the indigent as specifically provided in the first sentence. The section is entitled "Who shall have preference," and yet on the particular problem you raise, that is, what shall be done when the hospital is already full, the Legislature expressed no preference for the indigent over the solvent, but merely of the recent over the remote. "It is a well known canon of statutory construction that expression of one thing is the exclusion of another." Hendricks v. Sweaney, 270 Mo. 543.

In Case v. Wilson, 151 Mo. App. 723, it was said: "Laws are presumed to be drafted with knowledge of all existing ones on the subject." Thus, if the Legislature had intended that the indigent should replace the solvent in the event of crowding, we would expect to find such an expression of intent in this very section, and yet it is omitted.

It has long been the policy of the Division of Mental Diseases to give preference to the indigent as to admittance, but not to discharge the paying patients to make room for the former. That this is of substantial weight in arriving at our ultimate conclusion is demonstrated by the language of the court in Barrett v. First National Bank, 297 Mo. 397, in part, as follows: "A long-continued interpretation of a statute by public officers charged with its execution should be considered in construing a statute." It appears to us then that not only would a construction of this section in favor of evicting paying patients not be a reasonable interpretation in view of the foregoing, but would not even be a just or fair interpretation. To evict a paying patient, paying or otherwise, while in a crucial stage of the course of medical treatment might very well work an irreparable damage on that patient.

In Plum v. The City of Kansas City, 101 Mo. 525, the court stated as follows: "It is a safe rule of construction to resolve any ambiguity or obscurity in a statute in favor of such reading as will best meet the demands of natural justice * * * *

Furthermore, Section 9321, supra, makes no distinction between indigent and solvent mental cases, and vests the absolute discretion as to who shall be discharged, and under what conditions, in the superintendent and staff of the hospital, and makes their decision, and theirs alone, absolutely final. From this and all of the preceding reasons, it manifestly appears that

the hospital has the right to refuse admittance to any insane person, if there are no facilities for his accommodation, and the superintendent deems the discharge of any patient, paying or otherwise, inadvisable.

CONCLUSION

It is the conclusion of this office that the officials of a state hospital do not have to accept an indigent insane person if the hospital is full, even though there are in the hospital a number of paying patients. However, if there are both indigent and solvent insane persons waiting for admission, the indigent must be first admitted.

Respectfully submitted.

H. JACKSON DANIEL Assistant Attorney General

APPHOVED:

J. B. TAYLOR Attorney General

HJD:ml

OFFICERS:

Clerk of the Circuit Court liable on official bond for funds and property in his custody by virtue of his office.

October 24, 1949

Honorable Robert G. Kirkland Prosecuting Attorney Clay County Liberty, Missouri FILED 49

Dear Sir:

Reference is made to your request for an official opinion of this Department, reading as follows:

"Please furnish my office at your convenience an opinion on the following question:

"Who is liable for or has to repay, account for, or make up cash and/or office equipment, the personal property of and belonging to and stolen from the office of the Clerk of the Circuit Court in a third class county?"

Section 13285, R. S. Missouri, 1939, relates to the official bonds of clerks of the circuit courts. The conditions of such bonds are set forth in this section which reads in part as follows:

"* * The bond shall be conditioned that he will faithfully perform the duties of his office, and pay over all moneys which may come to his hands by virtue of his office, and that he, his executors or administrators, will deliver to his successor, safe and undefaced, all books, records, papers, seals, apparatus and furniture belonging to his office."

The terms of the statute are quite plain and unambiguous and unquestionably require the officers referred to therein to account for all moneys and property coming into the hands of such officers by virtue of their official position. We note that the element of attention to 46 C.J., "Officers," paragraph 314, page 1039, which reads as follows:

"According to the more general rule the liability of a public officer for public

funds and property in his custody is that of an insurer rather than that of an ordinary bailee, and he is liable for loss resulting from theft, robbery, fire, or the failure of the depositary. * * *"

This is the rule which is applied in Missouri as appears from State v. Moore, 74 Mo. 413, 41 Am. R. 322; State v. Powell, 67 Mo. 395, 29 Am. R. 512; Fayette v. Silvey, 290 S.W. 1019. It, therefore, appears the fact that public funds and property may be stolen from the clerk of the circuit court will not serve to relieve such officer of his duty to account for such funds and property.

Under similar circustances, the Supreme Court of Missouri cited with approval the following rule in State ex rel. v. Powell, 67 Mo. 395, 29 Am. R. 512:

"* * Public officers, however, are universally held to a more rigorous accountability than simple trustees for the public funds committed to their keeping; and though, in a general sense, they may be said to be bailees, still they are bailees who are subject to special obligations for the benefit of the public, and the degree of their responsibility is not to be determined by the ordinary law of bailment. In the United States v. Prescott, 3 How. 578, a leading case on this subject, it was pleaded to a suit on an official bond that the funds had been feloniously stolen, taken and carried away without any fault or negligence on the part of the officer, and the court, holding the plea insufficient, said: 'Public policy requires that every depositary of the public money should be held to a strict accountability; not only that he should exercise the highest degree of vigilance, but that 'he should keep safely' the moneys which come to his hands. Any relaxation of this condition would open a door to frauds, which might be practical with impunity. * * *"

CONCLUSION

In the premises, we are of the opinion that the clerk of a circuit court in a county of the third class is liable upon his

official bond for all public funds and property coming into his hands or under his control by virtue of his official position, and that the fact that such public funds and property are stolen will not serve to relieve such officer from such liability.

Respectfully submitted,

WILL F. BERRY, JR. Assistant Attorney General

APPROVED:

J. E. TAYLOR Attorney General

WFB/feh

CIRCUIT JUDGE:
ORDINANCES:
VENUE:
APPEALS:

Appeals from Municipal Court of Kansas City, Missouri, are to Circuit Court of Jackson County even though violation may have occurred in that part of Kansas City situated in Clay County.

November 16, 1949

Honorable Robert G. Kirkland Prosecuting Attorney Clay County Liberty, Missouri FILED 49

Dear Sir:

This is in answer to your letter of recent date requesting an official opinion of this department and reading as follows:

"Please furnish my office at your convenience with an opinion on the following proposition:

"Assuming that the municipality of Kansas City annexes and makes a part of that municipality a portion of Clay County, and assuming further that all this is in due form and legal, and assuming further that afterwards the Kansas City Police Department arrest a person in that portion of Kansas City which is also a portion of Clay County and charge him with a violation of an ordinance of Kansas City and the person is convicted in the police court of Kansas City sitting in that portion of Kansas City which is in Jackson County, and assuming further that pursuant to section 6285 R. S. Mo. 1939 the person convicted appeals, to what Circuit Court may or must the appeal be taken, the Circuit Court in Jackson County, or in Clay County?

"It is my information from the press that the municipality of Kansas City intends to move into Clay County, January 1, unless ordered not to by some ruling of the Supreme Court, for that reason I would appreciate your opinion on this above proposition as soon as convenient for the purpose of making necessary arrangements."

Section 399 of the Charter of Kansas City provides as follows:

"Appeals may be taken from the municipal court to the circuit court of Jackson County, Missouri, in the manner and upon the conditions prescribed by ordinance."

Section 16 of Article IX of the Constitution of 1875, provided in part as follows:

"Any city having a population of more
than one hundred thousand inhabitants
may frame a charter for its own government, * * * One of such certificates
shall be deposited in the office of the
Secretary of State, and the other, after
being recorded in the office of the recorder of deeds for the county in which
such city lies, shall be deposited among
the archives of such city, and all
courts shall take judicial notice thereof. * * *"

A similar provision was adopted as Section 16 of Article IX of the Constitution on November 2, 1920. A similar provision is found in Section 19 of Article VI of the Constitution of 1945, except that such provision applies to any city having more than 10,000 inhabitants. Section 399 of the Charter of Kansas City, quoted supra, is not in conflict with the constitution or laws of the state, and, therefore, such provision governs all appeals from the municipal court of Kansas City.

CONCLUSION.

It is the opinion of this department that appeals from the Municipal Court of Kansas City are to the circuit court of Jackson County.

Respectfully submitted,

APPROVED:

C. B. BURNS, JR. Assistant Attorney General

J. E. TAYLOR Attorney General (1997) HEALTH:

outy State Commissioner of Health appointed by the county urt in a county of the third class shall be appointed for a term of one year and said term of office shall commence on the date of the appointment first made by the county court. A county of the third class can have only one deputy state commissioner of health at any given time.

December 19, 1949

12/21/49

Mr. Robert G. Kirkland Prosecuting Attorney Clay County Liberty, Missouri

Dear Sir:

I.

We have received the following request for an official opinion from you, which reads as follows:

> "In a county of the third class, must a Deputy State Commissioner of Health appointed by the County Court, under Sec. 9745, as amended in 1945, be appointed (for the first time) for a full year from the date of the appointment or for a full calendar year or for any less period of time? Under this section in a county of the third class, can there be only one Deputy State Commissioner of Health at any given time?"

Section 9745 as enacted by Laws of Missouri, 1945, at page 976, omits the time that the appointment of the deputy state commissioner of health shall be made by the county court as was the case in said Section 9745 before its repeal and reenactment by the Legislature in 1945. Section 9745 reads as follows:

> "The county courts of the several counties of this state may appoint a duly licensed qualified physician as a deputy state commissioner of health for a term of one year, and in the event a vacancy is created in the office of deputy state commissioner of health, such court may appoint a duly licensed qualified physician for the unexpired term. If the county court of any county decides to appoint a deputy state commissioner of health as empowered in this law, it shall agree with said commissioner as to the compensation and expenses to be paid for such service, which amount shall be paid out of

the county treasury of the county. Nothing contained herein shall be construed to require the county court of any county to appoint a deputy state commissioner of health in any county."

It will be observed that the statute prescribes only the length of the term of the office it creates; it no longer contains any provisions as to when the term shall commence or when it shall end. The Supreme Court in the case of State ex rel. Rosenthal v. Smiley, 304 No. 549, 1.c. 558, has held: (263 S.W. 825)

"* * *Under the rule of construction applicable
to such a statute which has long obtained in this
State it must be held that it was the legislative
intent that the 'term' of the office should
consist of consecutive periods of two years, following each other in regular order, the one commencing
where the other ends, and that the initial term
should commence on the date of the appointment first
made by the county court. When the appointing
power named the first incumbent it thereby as
effectually fixed the dates of the beginning and
termination of the initial term of the office,
and of the subsequent terms as though they had
been expressly prescribed by the Legislature.
(State ex inf. v. Williams, 222 Mo. 268; State
ex rel. v. Stonestreet, 99 Mo. 361.)

"When the duration of the term is fixed, and also the beginning or ending, or both, a vacancy, if it occurs, is in the term of office as distinct from being in the office itself, and an appointment to fill such vacancy can only be for the unexpired portion. This rule, which makes for uniformity and is in consonance with the general intent of our Constitution and legislative enactments has had the repeated sanction of this court. * * "

The Supreme Court held in State ex inf. v. Williams, 222 Mo. 268, in a case involving a controversy as to the beginning or ending of the term of office of a factory inspector that was to be appointed by the Governor of Missouri for a term of four years:

"When the General Assembly created the office of factory inspector, prescribing the length of the term, but failing to designate the commencement or ending of such term, and investing the Governor with the power of appointment to fill such office, that the

Governor had the right to fix the commencement and ending of such term there certainly can be no dispute."

* * * * * * *

"The statute is silent on the point as to the beginning of the first appointee's term, and the reason for this is most obvious, since, the power of appointment being lodged in the Executive, it belonged to him in fact, if not in law, to determine the time of the inception of the actual official term of such appointee; the duration of that term was already fixed by law. But if the Legislature being possessed of the power, had fixed the date of the commencement of the first appointee's official term, it would not be questioned that such initial point, being once made sure and steadfast, would recur at every corresponding period of two years. This must be true, or else the premises from which this conclusion is drawn sustained as it is by authority, that a "term of office uniformly designates a fixed and definite period of time," must be false. As the Legislature did not fix the date when the official term of the first appointee under the new law was to begin, this date was necessarily left to be fixed by the appointing power; but, when fixed, the determination thus reached must have been as effectual in all its incidents and consequences as if previously made by the Legislature. This also must be true, or else it must be true that the Executive was incapable of fixing such initial point, and that, therefore, it never was fixed, which is an impossible as well as an absurd, supposition.

"This reasoning leads to this result: That the date of the appointment first made by the Governor for the office in question, initiated the official term of the first appointee, and that all subsequent appointments necessarily had reference to such initial period, and, so far as lawful, conformed thereto. Attorney General ex rel. v. Love, 39 N.J.L. 476, is decisive of this point. And the general rule is elsewhere recognized that when no

time is mentioned in the law, from which the term shall commence, it must begin to run from the date of the election. * * *

Section 655, R. S. Mo. 1939, provides in part as follows:

"The construction of all statutes of this state shall be by the following additional rules, unless such construction be plainly repugnant to the intent of the legislature, or of the context of the same statute: * * * * * third, the word 'month' shall mean a calendar month, and the word 'year' shall mean a calendar year, unless otherwise expressed, and the word 'year' be equivalent to the words 'year of our Lord;' * * *

If we followed this statute strictly we would construe the temof one year in said Section 9745 to mean calendar year in order to conform with the rule stated in said Section 655, supra. But this rule is made subject to the qualification that such a construction is not to be given where it would be plainly repugnant to the intent of the Legislature or to the context of the statute in which the word is used. (City of St. Charles v. Union Electric Company of Missouri, 185 S.W.(2d) 295, l.c. 310.)

Since the county court must agree with the deputy commissioner of health as to the compensation and expenses to be paid for said services, according to the provisions of said Section 9745, supra, then it necessarily follows that the amount of the compensation that said deputy commissioner of health is to receivemust be in the budget of the county for the year in which the deputy commissioner of health is to serve. The Supreme Court has held "that any payment ordered by the county court of a county of less than 50,000 inhabitants, where there was no balance budgeted with which to make payment, would be void under the provisions of Section 10917 applicable to such county.* * *" (See Mo. Kan. Chemical Co. v. Christian County, 352 Mo. 1087, 1.c. 1090)

If a vacancy occurs in the office of deputy state commissioner of health for your county during the year, Section 9745, supra, provides that the court may appoint a duly licensed qualified physician for the unexpired term. We could construe this to mean for the remainder of the year that had not expired. We trust that this answers the first question in your request.

The second question in your request is whether or not a county of the third class may have more than one deputy state commissioner of health at any given time. Said Section 97h5, supra, uses the words "a deputy state commissioner of health," and also uses the

words "the office of deputy state commissioner of health." Section 9746, R. S. Mo. 1939, as amended by Laws of Missouri, 1945, page 976, provides:

"In all counties of class one the county court of such county may appoint such deputies or assistants to or for the deputy state commissioner of health of such county, and when appointed, shall fix a reasonable compensation, including expenses of such deputies and assistant, all to be paid out of the county treasury."

This section applies to class one counties while Section 9745, supra, applies to the county courts of the several counties of this state. We believe that this indicates an intent on the part of the Legislature to restrict the appointment in all counties, except counties of class one, to one deputy state commissioner of health. We realize that Section 652, R. S. Mo. 1939, provides as follows:

"When any subject-matter, party or person is described or referred to by words importing the singular number or the masculine gender, several matters and persons, and females as well as males, and bodies corporate as well as individuals, shall be deemed to be included."

This section is subject to Section 653, R. S. Mo. 1939, which provides:

"The rules prescribed in the last two sections shall apply in all cases, unless it be otherwise specially provided, or unless there be something in the subject or context repugnant to such construction."

We believe that it would be repugnant to the intent of the Legislature to construe the word "a" to include more than one because there would be an overlapping of duties and responsibilities between two or more deputy state commissioners of health in the same county and a great deal of confusion if they promulgated different rules and regulations in regard to health matters.

We realize that the Supreme Court said, In re: Dean's Estate, 350 Mo. 494, 1.c. 504, 166 S.W.(2d) 529:

"* * *Furthermore, Sec. 652, R. S. 1939, Mo. R.S.A., sec. 652, provides that wherever any subject matter is referred to by words

importing the singular number, several matters shall be deemed to be included. In other words, in statutes the singular may be taken as including the plural."

But we believe that words importing the singular number may not be extended and be applied to several persons or things except when it is necessary to carry out the evident intent of the statute and this was so held in the case of First National Bank v. State of Mo. 14 S.C. 213, 263 U.S. 640, 68 L.Ed. 486.

The Supreme Court of Missouri has held:

"The primary rule of construction of statutes is to ascertain the lawmakers' intent from the words used if possible; and to put upon the language of the Legislature, honestly and faithfully, its plain and rational meaning and to promote its object, * * *"(Haynes v. Unemployment Compensation Commission, 353 Mo. 540, 1.c. 546, 183 S.W.(2d) 77.)

We are convinced that the Legislature created the office of deputy state commissioner of health and that it is a public office with governmental functions, powers and duties. When the county court exercised its power of appointment the office came into existence as a fixed and established county office. There could only be one office of deputy state commissioner of health in the county. State v. Smiley, supra. State ex inf. Crain v. Moore, 339 Mo. 492, l.c. 500; State ex inf. Wallach v. Loesch, 350 Mo. 989, l.c. 997.

III.

CONCLUSION

It is the opinion of this department that a deputy state commissioner of health appointed by the county court in a county of the third class shall be appointed for a term of one year and said term of office shall commence on the date of the appointment first made by the county court and in the event of a vacancy in the office then the court may appoint for the unexpired term, that is, the remainder of the year. The term of the office is not upon the calendar basis but for a period of 365 days from the date of the appointment. A county of the third class can

have only one deputy state commissioner of health at any given time.

Respectfully submitted,

STEPHEN J. MILLETT

Assistant Attorney General

APPROVED:

J. E. TAYLOR Attorney General

SJM:mw Wy

COUNTY HIGHWAY ENGINEER: (1) County highway engineer in third class county authorized to appoint assistants only upon determination of inability to properly perform all the duties of office. (2) Salary of county highway engineer in counties of the third class and necessary assistants to be paid out of Class 4 Funds.

February 21, 1949

3-4

Honorable Howard B. Lang, Jr. Prosecuting Attorney Boone County Columbia, Missouri

Dear Sir:

Reference is made to your request for an official opinion of this office reading as follows:

"The Highway Engineer of this county has two persons who have been assisting him in the carrying on of his work. In his budget requests in the past he has always put these men's pay as payable out of Class 3. He is now desirous of designating these persons as assistants to him and paying them out of Class 4.

"Would you kindly render an opinion, first, as to whether or not he can appoint the assistants, and, secondly, if he does appoint them, can they be paid out of Class 4 or must they be paid out of Class 3?"

With respect to the first question you ask, your attention is directed to an act found Laws of Missouri, 1945, page 1493, appearing as Section 8660, Mo. R.S.A.. This statute and all others referred to herein are applicable to counties of the third class to which Boone County belongs in accordance with the classification of counties adopted by the General Assembly and found Laws of Missouri, 1945, page 1801.

Section 8660, Mo. R.S.A., referred to supra, reads in part as follows:

" * * In the event that the county highway engineer cannot properly perform all the duties of his office, he shall, with the approval of the court, appoint one or more assistants, who shall receive such compensation as may be fixed by the court." From the quoted portion of the statute, it is apparent that no authority exists in the county highway engineer to appoint any assistants unless such officer is unable to properly perform all of the duties of his office. This question is necessarily one of fact and not for determination by this department. We, therefore, can only answer your question by reference to the statute quoted and by saying that the authority of the county highway engineer with respect to the appointment of assistants must be determined in accordance therewith.

With respect to the second question you have asked, we direct your attention to Section 10911, R. S. Mo. 1939, found as a part of the County Budget Laws and creating the various classification of expenditures. We find therein the following:

"Class 3. The county court shall next set aside and apportion the amount required, if any, for the upkeep, repair or construction of bridges and roads on other than state highways (and not in any special road district). The funds set aside and apportioned in this class shall be made from the anticipated revenue to be derived from the levies made under Sections 8526 and 8527 R. S. Mo. 1939. * * * *

"Class 4. The county court shall next set aside the amount required to pay the salaries of all county officers where the same is by law made payable out of the ordinary revenue of the county, together with the estimated amount necessary for the conduct of the offices of such officers, including stamps, stationery, blanks and other office supplies as are authorized by law. * * *

You will note that the funds set aside in apportion to Class 3 are to be those derived from revenue arising from the levies made under what are "designated as Sections 8526 and 8527, R. S. Mo. 1939." Section 8526, R. S. Mo. 1939, has been repealed by an act found Laws of Missouri, 1945, page 1478.

Section 8527, R. S. Mo. 1939, has been reenacted and appears Laws of Missouri, 1945, page 1478, and as Section 8527, Mo. R.S.A. This statute, after providing for the

Hon. Howard B. Lang, Jr.

levying of an additional tax for a fund to be known as the "special road and bridge fund," contains the following pertinent directions with respect to the usage to be made of the money contained therein:

" * * * to be used for road and bridge purposes and for no other purpose whatever; * * * "

While it might be argued that the payment of administrative expenses such as the salary of the assistants to the county highway engineer are for "road and bridge purposes" within the meaning of that phrase as used in Section 8527.

Mo. R.S.A., yet we believe that the general rule, with respect to the payment of salaries of county officers, is the one which should be followed. This general rule has been expressed by the Supreme Court of Missouri, en banc, in State ex rel.

Hall vs. McElroy et al., 274 S.W. 753, wherein the court said:

" * * * The law, after creating the office and prescribing the duties, fixes a salary of \$125 per month for the performance of those duties. The law does not say from what fund this salary shall be paid. We realize that in the creation of an office, the lawmakers might designate a fund out of which the salary shall be paid, and this fund may be other than the salary fund of the county. But such was not done in this case. In such situation it will be presumed that the Legislature intended the salary to be paid as other official salaries are paid, i. e., out of the salary fund of the county. We think this to be clear and without doubt. * * * *

In view of the rule so declared, particularly when considered in connection with the provisions of Section 10911, R. S. Mo. 1939, creating under Class 4 a fund for the payment of salaries of county officers, we believe that the salary of assistants to the county highway engineer should properly be paid from moneys apportioned to such class.

CONCLUSION

In the premises, we are of the opinion that a county highway engineer in a county of the third class is without authority to appoint assistants except when such officer is unable to properly perform all of the duties of his office.

We are further of the opinion that assistants to a county highway engineer in a county of the third class should be paid by warrants drawn upon Class 4.

Respectfully submitted,

WILL F. BERRY, JR. Assistant Attorney General

APPROVED:

J. E. TAYLOR Attorney General

WFB:VIM

NEWSPAPERS:

Weekly newspaper must be published regularly and consecutively, each week, for three years to qualify to publish legal notices.

May 18, 1949.

Honorable Howard B. Lang, Jr., Prosecuting Attorney Boone County Columbia, Missouri

Dear Mr. Lang:

This is in response to your recent request for an official opinion from this department, such request reading as follows:

"A newspaper has been in publication continuously and with consecutive issues for more than three years prior to April 1, 1949. Some time before April 1, 1949, the printing press and other physical properties were sold and removed from the building. However, the paper was printed thereafter by another press and was distributed as second class mail. The publication was purchased during the week of April 18, 1949. The new purchaser, after taking the first issue under the new management to the post office, was for the first time informed by the postmaster that no issues of this weekly paper had been presented to the post office between April 1, 1949 and the date presented by the new publisher. This would make a lapse of about two weeks.

"Is this newspaper one which can be recognized as a paper which can now run legal notices under the provisions of Section 14968 as amended, Laws 1943, page 859, Section 1?"

To rule on the question presented in the inquiry it is only necessary that we construe the language appearing in Section 14968, R.S. Mo. 1939, as the same has been amended and appears in its present form in Laws of Missouri 1943, page 859. The section is quoted in its entirety as follows:

"All public advertisements and orders of publication required by law to be made and all legal publications affecting the title of real estate,

FILED 5/

shall be published in some daily, tri-weekly, semi-weekly or weekly newspaper of general circulation in the county where located and which . shall have been admitted to the post office as second class matter in the city of publication; shall have been published regularly and consecutively for a period of three years; shall have a list of bona fide subscribers voluntarily engaged as such, who have paid or agreed to pay a stated price for a subscription for a definite period of time: Provided, that when a public notice, required by law, to be published once a week for a given number of weeks, shall be published in a daily, tri-weekly, semi-weekly or weekly newspaper, the notice shall appear once a week, on the same day of each week, and further provided, that every affidavit to proof of publication shall state that the newspaper in which such notice was published has complied with the provisions of this section: Provided further, that the duration of consecutive publication herein provided for shall not affect newspapers which have become legal publications prior to the effect-ive date of this section. Provided, however, that when any newspaper shall be forced to suspend publication in any time of war, due to the owner or publisher being inducted into the armed forces of the United States, the same may be reinstated within one year after actual hostilities shall have ceased, with all the benefits under the provisions of this section, upon the filing with the Secretary of State of notice of intention of said owner or publisher, his widow or legal heirs, to republish said newspaper, setting forth the name of the publication, its volume and number, its frequency of publication, and its readmission to the post office where it was previously entered as second class mail matter, and when it shall have a list of bona fide subscribers voluntarily engaged as such who have paid or agreed to pay a stated price for subscription for a definite period of time. All laws or parts of laws in conflict with this section except sections 14970, 14971, 14972, Laws of Missouri, 1941, and Sections 7771, 7772, and 7773, Revised Statutes of Missouri, 1939, are hereby repealed."

The section just quoted sets forth in clear and concise language the requirements to be met by a newspaper before it is authorized to publish public advertisements and orders of publication required by law to be made. From facts set forth in the opinion request it is assumed that the newspaper in question was a weekly newspaper and met the requirements of the statute before its regular publication was interrupted a short time prior to April 1, 1949, by a sale of the printing press and other physical properties necessary for publication of the newspaper. it stands conceded that the publication of this newspaper was not made for a period in excess of two weeks. The question to be decided is whether the two week suspension in publication violates the plain language of the statute requiring that such newspaper "shall have been published regularly and consecutively for a period of three years" before it becomes eligible to carry legal publications and notices. The qualifications set forth in the statute have been lessened and dispensed with in certain instances as may be noted by alluding to the several provisos contained therein, but the facts at hand do not require that such provisos be considered.

The statute in question is plain and unambiguous and we can go no farther than to give to the words used, their plain and ordinary meaning. A weekly newspaper, under the rule laid down in the statute, must be published "regularly and consecutively" for a period of three years before it is eligible to accept legal notices. The word "regularly" means in a regular manner; in a way or method according to rule or established mode (See: Words and Phrases, Perm. Add. Vol. 36, p. 659). The word "consecutive" has been defined as "succeeding one another in regular order" (Black's Law Dictionary, Ed. 1944). Considering the accepted definitions of the words "regularly" and "consecutive" as applied to the publication of a weekly newspaper, it is evident from the facts disclosed by the inquiry made, that the strict requirements of the statute in question have not been met by a weekly newspaper which has not been published for over two weeks.

CONCLUSION.

It is the opinion of this department that a weekly newspaper

Honorable Howard B. Lang, Jr. - 4 -

having failed to publish issues regularly and consecutively each week for a period of three years fails to meet the general requirements laid down by Section 14968, Laws of Missouri 1943, page 860, qualifying newspapers to publish legal notices.

Respectfully submitted,

JULIAN L. O'MALLEY Assistant Attorney General

APPROVED:

J. E. TAYLOR Attorney General

ROADS AND BRIDGES: Bridge across ditch in drainage district organized by circuit court is maintained by county if county court has adjudged bridge sufficient, but by drainage district if county court has not adjudged bridge sufficient.

July 19, 1949

Honorable J. Harry Latham Prosecuting Attorney Andrew County Savannah, Missouri



Dear Sir:

This is in answer to your letter of recent date requesting an official opinion of this department and reading as follows:

> "I am writing you for an opinion concerning bridges across drainage ditches where the drainage ditches have been constructed across the county highways.

"In the instant case the drainage district was organized in 1924 under the law relating to the organization of drainage districts by Circuit Court. At various places the drainage ditch crossed the public highway of Andrew County and the drainage district constructed the bridges, which then became a part of the public highway and has since said time, been maintained and kept in repair by Andrew County as a part of the County road system.

"At the present time, the bridge is inaccessible because high waters have destroyed the approaches and otherwise damaged said bridge, leaving it in such a condition that in order to make a proper bridge, it will have to be torn down and rebuilt.

"The County does not have sufficient funds at this time to rebuild the bridge if the burden is on the County to do so.

"Specifically, our question is whose obligation is it to rebuild the bridge. Does the law place the burden on the County or upon the drainage district to rebuild this bridge?" We believe that the question of whether the county or the drainage district is required to repair the bridge in question depends on whether or not the county court of Andrew County has "adjudged sufficient" the bridge. In the case of State ex rel. vs. Big Medicine Drainage Dist. No. 1, 196 S.W. (2d) 254, the Supreme Court of Missouri said, 1.c. 257:

"The amendment, we believe, evidences a transition of policy. Although requiring, as before, the bridges to be constructed by the district when its ditches are excavated through public highways (because ditches excavated through public highways by the district make the construction of bridges necessary), the legislature now, since 1929, desires, we believe, to recognize the benefit accruing to the public (due to the reclamation of swamp, wet or overflowed lands and their transformation to productivity) to the extent that it has balanced the benefit against the maintenance of bridges, making the maintenance the obligation of the public. However, it is emphasized that under the reenacted statute (Section 12354, supra) such bridges, the maintenance of which may become the obligation of the authorities authorized to maintain the roads, are sufficient bridges -bridges which are adjudged sufficient by the county courts. In this wise the authorities authorized to maintain the roads, although obligated to undertake the maintenance of bridges adjudged sufficient, were to be and are protected from the burden, never intended by the legislature, of maintenance and repair, and reconstruction, of insufficient bridges. We have not found in any statute an evidence of the legislative intent that the maintenance of a drainage district's insufficient bridges should be undertaken by any public road maintaining authority. * * * * "

It will be noted that the court has italicized the words "adjudged sufficient." While it might be contended that such action by the county court could be shown only by an order of record, it is our view that the maintenance by the county court of the bridge since 1929, the date upon which the court held the county was authorized to maintain such bridges,

constituted an adjudging of the sufficiency of the bridge by the county. From the facts stated in your letter, it also appears that the bridge was sufficient for most of the past 20-year period and only recently has become in need of extensive repairs. Therefore, we believe under the circumstances that the county court of Andrew County has adjudged such bridge to be sufficient and that it is the responsibility of such county to repair such bridge.

CONCLUSION

It is the opinion of this department that it is the duty of Andrew County to repair a bridge built across a drainage ditch in a drainage district organized by the circuit court when the county has maintained such bridge for the past 20 years.

Respectfully submitted,

C. B. BURNS, JR. Assistant Attorney General

APPROVED:

J. E. TAYLOR Attorney General

CBB:VLM

MOTOR VEHICLES:

Gross weight of combination of commercial motor vehicle and trailer to be used in computing registration fee for the commercial motor vehicle.

September 1, 1949

Honorable J. Harry Latham Prosecuting Attorney Savannah, Missouri



Dear Sir:

Your recent opinion request reads as follows:

"We request an opinion from your department relative to whether or not a tandem house trailer hitched on behind a straight truck, constitutes a "combination" under the purview of Sec. 8369 (c) Revised Statutes of Missouri, 1939 as amended, and whether or not a house trailer is within the purview of the definition of "trailer" of section 8367, Revised Statutes of Missouri, 1939, as amended. The circumstances involved are as follows:

"A 1938 Ford straight truck loaded with show equipment was pulling a tandem house trailer, fitted up for living quarters for about eight people. The said truck was licensed commercially for a total gross weight of 10,000 pounds. The combined weight of the loaded truck and house trailer was 17,150 pounds, thus exceeding the license on the truck by 7,150 pounds. (In the past arrests have been made on combination of this type, but) the question has been raised as to whether or not we are permitted to include the combined weight in computing the weight on the license of the truck. The trailer was properly licensed for a fee of \$3.00.

"We ask your opinion as to whether or not under the sections of the statute and the circumstances involved, we may charge the truck with improper licenses."

The tandem house trailer hitched behind a straight truck satisfies the definition of a trailer as provided by Section 8367 Mo. R.S.A., as it is a "vehicle without motive power designed for carrying property or passengers on its own structure and for being drawn by a self-propelled vehicle."

Section 8369 (c) provides for registration fees for commercial motor vehicles, which fees are graduated according to the gross weight of the vehicle. This section also provides for a registration fee of \$3.00 for each trailer or semi-trailer. You stated in your opinion request that the \$3.00 fee for the trailer had been paid, and the question raised is as to what gross weight should determine the registration fee to be paid on the truck.

Section 8370(d) Mo. R.S.A., which provides for the computation of fees, reads as follows:

"Fees of commercial motor vehicles shall be based on the gross weight of the vehicle or any combination of vehicles and the maximum load to be carried at any one time during the license period."

Therefore, it has been expressly provided that when a commercial motor vehicle is used in combination with other vehicles, the tandem house trailer in this instance, the gross weight of the combination should be used in the computation of the fees. Therefore, in the present instance, the truck was properly charged with an improper license.

CONCLUSION

It is, therefore, the opinion of this department that

for the purpose of computing the registration fee to be paid on a commercial motor vehicle to which is hitched a tandem trailer, the gross weight of the combination of the vehicles should be used as provided for by Section 8370(d) Mo. R.S.A.

Respectfully submitted,

RICHARD H. VOSS Assistant Attorney-General

APPROVED:

J. E. TAYLOR Attorney-General FOOD AND DRUG: Imitation vanilla not labeled "imitation"

HEALTH: violates provisions of Pure Food and Drug Act.

February 17, 1949



Mr. Warren E. Lofton Director, Bureau of Food and Drug Inspection Jefferson City, Missouri

Dear Sir:

This is in reply to your request of February 15, 1949, which reads as follows:

"On January 30, 1949, I entered a store in Missouri and made several purchases. In the course thereof, I asked for a bottle of vanilla. The clerk proceeded to a shelf in the store on which were displayed extracts and flavors. He picked up a bottle of X X X Superior Flavor. The label read substantially as follows:

X X X
SUPERIOR FLAVOR
GONTAINS:
VANILLIN
COUMARIN
VANILLA
ALCOHOL CLYCOL SYRUP
CARAMEL COLOR
AND WATER

NOTICE

This excellent flavor
is not offered for sale or (Small print)
sold as an imitation of
any other product

Mfg. by X X X MANUFACTURING CO.

"I asked the clerk if that was vanilla extract, and he said 'yes.' I took the bottle and looked at the label and told him that it was labeled 'Superior Flavor' and I was not sure it was vanilla. He stated that this article had been sold by them for some time as vanilla extract.

"Again, on February 12, 1949, I visited another store in Missouri and found X X X Superior Flavor displayed on a shelf with a pure vanilla extract. On a shelf above the vanilla several imitation flavors were displayed. I picked up a bottle of X X X Flavor and asked the lady at the cashier's desk if this article was vanilla extract. She said 'Yes, it was.'

"Will you kindly furnish us with an opinion as to whether or not the labeling of X X X Superior Flavor, as set out above, violates the Food and Drug Laws of the State of Missouri."

Section 9866, Mo. R. S. A., reads as follows:

"A food shall be deemed misbranded-"(a) If its labeling is false or misleading in any particular.

* * * * * * * * *

"(c) If it is an imitation of another food, unless its label bears, in type of uniform size and prominence, the word 'imitation,' and, immediately thereafter, the name of the food imitated.

** * * * * * * * * *

Section 9866, supra, is a part of the Missouri Pure Food and Drug Act which is similar to the Federal Pure Food and Drug Act.

In the case of United States v. Schider, 246 U. S. 519, 38 Sup. Ct. 364, 62 L. Ed. 863, the court declared the purpose of the Pure Food and Drug Act as follows, l.c. (L. Ed.) 865:

"We have heretofore said: 'The purpose of the act is to secure the purity of food and drugs and to inform purchasers of what they are buying. Its provisions are directed to that purpose and must be construed to effect it. United States v. Antikamnia Chemical Co. 231 U.S. 654, 665, 58 L. Ed. 419, 424, 34 Sup. Ct. Rep. 222, Ann. Cas. 1915A, 49. 'The legislation, as against misbranding, intended to make it possible that the consumer should know that an article purchased was what it purported to be; that it might be bought for what it really was, and not upon misrepresentations as to character and quality. ! United States v. Lexington Mill & Elevator Co. 232 U. S. 399, 409, 58 L. Ed. 658, L.R.A. 1915B, 774, 34 Sup. Ct. Rep. 337. And see United States v. Coca Cola Co. 241 U. S. 265, 277, 60 L. Ed. 995, 1001, 36 Sup. Ct. Rep. 573, Ann. Cas. 19170, 487.

"The stuff put into commerce by defendant was an 'imitation,' and, if so labeled, purchasers would have had some notice. To call it 'compound essence of grape' certainly did not suggest a mere imitation, but, on the contrary, falsely indicated that it contained something derived from grapes. See Frank v. United States, 113 C. C. A. 188, 192 Fed. 864. The statute enjoins truth; this label exhales deceit."

In the case of Day-Bergwall Co. v. State, 207 N.W. 959, the Supreme Court of Wisconsin had under consideration a case wherein the defendant was charged in an information with violations of the Pure Food Laws of the state. Defendant was a manufacturer of a compound known as "Van cu co." The state contended that the compound was colored in imitation of the genuine color of another substance, viz., vanilla extract. We will set out at length the parts of the court's opinion in this case because of the similarity between the product then under consideration and the instant product, l.c. 961, 962:

"Van cu co is sold in bottles contained in cartons, which are properly labeled, as follows:

"'Net contents la fluid ozs. VAN CU CO. A compound composed of artificial vanillin and coumarin, sugar, water and alcohol. Colored with caramel color. Manufactured by Day-Bergwall Co., Milwaukee.'

"These labels, so displayed, are neither deceptive nor misleading, for they contain a true statement of all the ingredients that are used in the manufacture of the compound. Without the addition of caramel, the product would assume the color of water, and be transparent, and such product so manufactured and sold would not constitute a violation of the statutes in question: and the only objectionable feature contained in the composition, and complained of, consists in the addition of caramel in such quantities as will produce a coloring which is either identical or similar to that of vanilla extract.

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" * * * Both vanilla extract and van cu co are sold to consumers for the sole purpose of adding flavor to food. Vanilla extract, as is well known, has been used for many years in the preparation of foods, and it serves the purpose of adding a delicious flavor. Its principal ingredient is vanillin, and, although the latter is synthetically prepared, it is of equal quality and serves fully the same purpose as the true product derived from the vanilla bean. A gallon of vanilla in the market costs about seven times as much as a gallon of van cu co, and it is sold at retail at a much higher price. Van cu co, as one of its principal ingredients, contains vanillin,

which is also the principal element in vanilla extract. Therefore it clearly appears that the product known as van cu co, colored as it is to imitate vanilla extract, lends itself readily to the perpetration of fraud in the retail trade, and the Pure Food Law of the state was not only enacted and designed for the protection of the public health, but for the protection of the public from fraud.

* * * * * * * * * * *

"In the instant case, as is indicated by the label, the imitation of the color of vanilla is achieved by the addition of caramel color to the compound, and it thus becomes clearly apparent that the object of the defendant in using such coloring matter is not for the purpose of adding an additional flavor or bouquet, but of producing a substance which in its appearance can readily be taken for vanilla extract. The use of mere coloring matter, even though the same be harmless, is equivalent to the use of a harmless dye, and where a dye is used to produce the color of another substance, the court or jury is warranted in finding that the imitation so resulting was a conscious one, and not a mere incident. Furthermore, the use of an ingredient which produces merely an imitation color is persuasive of a conscious attempt to imitate, especially where, as here, the defendant had a choice of ingredients. * * *

Also, in that case, the court, in its summary of the evidence adduced at the trial, brought out the fact that the agents of the Food Department on numerous occasions in purchasing vanilla extract were given Van eu co by the dealers.

From a consideration of the cases heretofore cited and the provisions of our act, we believe that the product in question is misbranded, in that it is an imitation of another food and the label does not bear the word "imitation" and immediately thereafter the name of the food imitated, because it violates Subsection (c) of Section 9866, Mo. R. S. A.

The manufacturer attempts to avoid the effect of Subsection (c) of Section 9866, Mo. R. S. A., by the addition of a notation in small print, as follows: "This excellent flavor is not offered for sale or sold as an imitation of any other product." We believe that it is clearly evident that the product is an imitation. Such a statement on the label would seem to violate Subsection (a) of Section 9866, Mo. R. S. A.

The statement by the Supreme Court of the United States in the case of United States v. Ninety-five Barrels, 265 U. S. 438, 44 Sup. Ct. 529, 68 L. Ed. 1094, is appropriate as applied to the facts of this case. At l.c. 1097 (L. Ed.) the court said:

"The statute is plain and direct. Its comprehensive terms condemn every statement, design, and device which may mislead or deceive. Deception may result from the use of statements not technically false, or which may be literally true. The aim of the statute is to prevent that resulting from indirection and ambiguity. as well as from statements which are false. It is not difficult to choose statements. designs, and devices which will not deceive. Those which are ambiguous and liable to mislead should be read favorably to the accomplishment of the purpose of the act. The statute applies to food, and the ingredients and substances contained therein. It was enacted to enable purchasers to buy food for what it really is. United States v. Schider, 246 U. S. 519, 522, 62 L. ed. 863, 865, 38 Sup. Ct. Rep. 369; United States v. Lexington Mill & Elevator Co. 232 U. S. 399, 409, 58 L. ed. 658, 651, L. R. A. 1915B, 774, 34 Sup. Ct. Rep. 337; United States v. Antikamnia Chemical Co. 231 U. S. 654, 665, 58 L. ed. 419, 424, 34 Sup. Ct. Rep. 222, Ann. Cas. 1915A, 49."

Conclusion.

Therefore, it is the opinion of this department that the label, as set out in the opinion request, is misbranded within

the meaning of the Pure Food and Drug Act of the State of Missouri, in that it is false and misleading and is an imitation of another food and the label does not bear the word "imitation" and immediately thereafter the name of the food imitated.

Respectfully submitted,

JOHN R. BATY Assistant Attorney General

APPROVED:

J. E. TAYLOR Attorney General

JRB:ml

MISSC rs: SOIL D. COMMISSIC.

Members of Commission may not vote by mail upon matters pertaining to the duties of the Commission; Commission proceedings must be fully recorded in the minutes of the Commission; Commission is required to formulate and fix rules for the holding of referendums; duty of Commission to conduct referendums or designate a disinterested and competent person, or persons, to do so;
April 21. 1949 failure of Missouri State Soil

Districts Commission to follow procedure prescribed in the Act creating it will invalidate its actions.

Honorable J. H. Longwell Chairman, Missouri State Soil 6/ d Districts Commission 128 Mumford Hall Columbia. Missouri

Dear Sir:

This office is in receipt of your recent letter requesting an official opinion with reference to a state of facts set forth in your aforesaid letter. It is the custom of this department in regard to such inquiries to quote the entire content of the letter requesting the opinion. However, in view of the length of your letter I shall not quote it in its entirety, but will briefly state the situation which it presents; the specific questions which you ask; and our conclusions in regard to these questions.

It appears from your communication that the State Soil Districts Commission received petitions, in proper form, from two townships in Lafayette County, Missouri, asking for the establishment of a soil district in said townships. Following the receipt of these petitions a meeting of the Commission was held on November 22, 1948, at which meeting these petitions were discussed, and tabled pending further investigation of them by the Commission. On the following December 14, 1948, the Chairman of the Commission and the Extension Soil Conservationist met with the Lafayette County sponsoring committee in Higginsville in regard to the necessity of establishing such a soil district as the petitions requested, and of having a public hearing on the matter. Following this meeting the Chairman of the Commission wrote letters to the members of the executive committee of the Commission, consisting of three members of the five member Commission, asking them to vote by letter on the holding of a public hearing. The vote of the executive committee was two to one in favor of such a hearing. This public hearing was held January 11, 1949. On January 17, following, the Chairman of the Commission wrote to the members of the Commission, sending a copy of the record of the public hearing, and asking them to vote by letter on the matter of whether the referendum should or should not be held. The vote of the Commission was in favor of the referendum. On February 23, following, the referendum election was held in Lafayette County, and the vote was in favor of the establishment of the soil district. Following the election, representatives from Lafayette County appeared before the Commission on March 21.

1949; and protested that the referendum election was void and should be set aside because of voting irregularities. The representatives stated that in their opinion the irregularities were:

(1) Unlawful use of powers of attorney; (2) Landowners voting as many times as they had deeds to land; (3) Opposition had no choice in selecting judges.

The Commission discussed this situation and it was the majority opinion of the Commission that the district in Lafayette County should be approved and recognized as a soil district on the basis of the referendum held in Lafayette County on the 23rd day of February, 1949.

With reference to the above situation you then ask the following questions:

Your first question is:

"Should there have been a meeting of the State Soil District Commission whereat, by proper procedure, the petitions which have been mentioned, were taken from the table so that they could be acted upon?"

We take it that in this question you are asking whether, instead of calling in to a meeting the members of the Commission, your sending them a report of the public hearing held on January 11, 1949, and having them vote by mail upon the matter of having or not having the referendum, was proper.

Let us at this time make the observation that the powers, duties and responsibilities of the State Soil Districts Commission are set forth and are limited by Senate Bill No. 80, as found in the Laws of Missouri for 1943, page 839, which bill, with an emergency clause, was enacted into law and was approved July 23, 1943. This aforesaid bill, which is the law of Missouri, does not set forth any particular manner in which the members of the Commission shall vote upon whether or not a referendum shall be held. Indeed the language of Senate Bill No. 80 does not, apparently, even make it necessary that an actual vote by the members of the Commission be taken upon this matter. That portion of Senate Bill No. 80 which we construe to relate to this particular matter states: "Upon reaching a favorable conclusion on these matters (the calling for a referendum election) the Commission shall call for and conduct, or cause to be conducted, a referendum, by ballot of land representatives within that area on the question of establishing the county or the specified township or townships as a soil conservation district." As we said above, from the language of the foregoing portion of the Act which relates to a determination by the Commission as to whether a referendum shall be called, it does not appear necessary that this

determination on the part of the Commission be reached by the members voting upon the question. You will observe that the language of the Act is, "upon reaching a favorable conclusion on these matters." Certainly voting upon the issue by the members of the Commission is the most expedient way in which to ascertain whether or not the Commission is favorably inclined toward holding the referendum, but we believe that such voting is not necessary in lieu of a general agreement by the members of the Commission at a Commission meeting that such a referendum be held. However. the question which now arises is whether it was proper for such an ascertainment of the attitude of the Commission toward the holding of a referendum be obtained by having the members of the Commission vote upon the matter by mail, from their homes throughout the state. instead of at a meeting of the Commission. We believe that the following sentence in Section 3, Subsection 3, of the Act, is revealing upon this point: "A majority of this Commission shall constitute a quorum, but the concurrence of a majority of the whole Commission shall be required for the determination of any matter within their duties." (Underscoring ours.) Certainly the determination by the Commission whether a referendum should be held was a "matter within their duties." And it would appear with equal certainty that the use of the word "quorum" contemplated that when the Commission decided any "matter within their duties," it should do so at a meeting of the Commission. Webster's Dictionary defines the word "quorum" as: "Such a number of the officers or "Such a number of the officers or members of any body as is, when duly assembled, legally competent to transact business." (Underscoring ours.) By no stretch of the imagination can we construe the use of the word "quorum" to mean anything but that when the Commission "determines any matter within their duties," it shall do so at a meeting of the Commission, not when the members of the Commission are scattered about Columbia and various parts of the State of Missouri.

Furthermore, the language of Subsection 3 which immediately follows the quoted sentence would seem to substantiate this opinion. The succeeding sentence is: "Each farmer member of the Soil Commission shall be entitled to expenses, including travel expenses, necessarily incurred in the discharge of his duties as a member of this Commission." This sentence provides travel expenses for each farmer member of the Commission incurred in the discharge of his duties, which, as we said, certainly include a determination of whether or not referendums shall be held. The language of Subsection 3, taken altogether, would seem to clearly indicate that when the Commission acts upon "any matter within their duties," it should do so at a meeting of the Commission, and that therefore there should have been a meeting of the State Soil Districts Commission, whereat, by proper procedure, the petitions in question were taken from the table so that they could be acted upon.

Finally, as being, in our opinion, determinative of this very

important issue, we direct your attention to the case of Wheeler v. River Falls Power Company, 215 Ala. 655, in which the court states:

"* * "The transcript of the record of the state board of health, put in evidence, disclosed the fact that there were present at the called meeting which undertook to adopt the rules and regulations in dispute three members of the state committee of public health, the state health officer included, and in addition the Governor, ex officio a member of the committee, and ex officio its chairman. Code Sec. 1047. the state board of censors of the medical association of the state, which, when acting in its appropriate capacity, is the state committee of public health, is composed of ten members elected by the association, and the absentees, who had been informed of the pendency of the proposed rules and regulations and their contents unanimously by mail certified their concurrence in the act of adoption. This cannot be accepted as the authorized legislative act of the state committee of public health.

"There is no provision of statute law whereby a minority of the committee of public health may exercise the legislative power as to minor details of administration committed to it by the Legislature, and it is clear that such power, having been committed to the aggregate of the members composing the committee, cannot by it be delegated elsewhere, or to any number of individuals acting separately. Of course, a quorum duly met may exercise the power of the committee. But a quorum is such number of the committee as is competent to transact its business, and that, according to the general law of such bodies, is a majority of the committee. The point here is that individual members of the committee, scattered about the state, cannot be counted to constitute a quorum of a meeting of the committee which in fact they did not attend. This proposition has been often stated, is clearly restated by the Supreme Court of the United States in United States v. Ballin, 144 U.S. 1, 12 S. Ct. 507, 36 L. Ed. 321, and further argument is hardly necessary. The sum of it is that, in the

absence of legislative authority to a different effect, a majority of the members must attend any meeting of the committee called for legis-lative purposes, otherwise there is no committee competent to act, but a majority of those present, when legally met, may bind all the rest. In other words, a major part of the whole is necessary to constitute a quorum, and a majority of the quorum may act. Says the Supreme Court of the United States, quoting from Chancelor Kent:

'There is a distinction taken between a corporate act to be done by a select and definite body as by a board of directors (in this case the committee of public health), and one to be performed by the constitutent members. In the latter case, a majority of those who appear may act; but in the former, a majority of the definite body must be present, and then a majority of the quorum may decide.

"See cases referred to by the court in United States v. Ballin, supra, on pages 7 and 8 of the report. Quoting the language of the Supreme Court of Pennsylvania, 'congregated deliberation is deemed essential.' Commonwealth v. Cullen, 13 Pa. 133, 53 Am. Dec. 450.

"Section 1048 of the Code of 1923, to which for convenience we refer, provides that--

when the state board of health (the medical association of the state of Alabama, Code Sec. 1046) is not in session said state committee of public health shall act for said board and have and discharge all the prerogatives and duties of said board, including the adoption and promulgation of rules and regulations provided for in this chapter (the chapter on Health and Quarantine). When said committee is not in session the state health officer shall act for said board and said committee and shall report to the said board, etc.

"And subsection 6 of section 1051 of the Code, to which we have before referred, provides that the state board of health shall have authority and jurisdiction to 'adopt and promulgate rules and regulations providing proper methods and details

for administering the health and sanitary laws of the state, etc.

"We find nothing in the foregoing provisions of the statute law to derogate mything from what we have said on the authority of United States v. Ballin and the cases there cited and discussed.

"Upon consideration of the authorities on the subject and the reason of the matter, we feel constrained to hold that the alleged rules and regulations governing the impounding of waters have not the authority of law. They were therefore properly excluded by the trial court, and being excluded, the principles decided in Meharg v. Alabama Power Co., and the other cases in that line to which we referred in the outset, left no standing room for appellant in the trial court."

We would call your further attention to the case of State ex rel. Rutherford et al. vs. Rhodes, 85 Pac. 332, which states:

"Our statute prescribing the terms of county courts contains the following provision: 'The county court is held at such times as may be appointed by law, and at such other as the court in term or the county judge in vacation, may appoint, in like manner and with like effect as the circuit court or judge thereof is authorized by section 901. B. & C. Comp. Sec. 915. The county judge and county commissioners of any county in this state do not constitute the county court thereof for the transaction of county business unless they assemble at the time prescribed by law, or at a time designated by a general order of such court to that effect made and entered in the journal during the term time, or by a special order made and filed by the county judge in vacation, authorizing the transaction of certain business therein specified. The county judge of Yamhill county and a county commissioner thereof not having assembled at a time thus prescribed, they did not compose the county court of that county for the transaction of county business, and could not make a valid order authorizing the calling of an election to determine whether or not the sale of intoxicating liquors as a beverage should be prohibited therein, and their attempt to make a regulation to that effect was void. Marsden v. Harlocker(Or.) 85 Pac. 328."

"Before the State Soil Districts Commission can call for a referendum on the establishing of a soil district must its minutes show its determination that the petitions are valid; must its minutes show that hearings were ordered to be conducted upon the subject of these petitions; must its minutes show that the Commission determined that the establishment of the proposed soil district would be effective in the saving of soil therein; must its minutes show that the proposed district, if established, could be feasibly administered; and must its minutes show that the Commission calls for a referendum upon the establishing of the proposed soil district?"

The single question present in the numerous subdivisions of question number 2, quoted above, is whether or not the minutes of the Commission's actions in regard to matters properly under consideration by it, must show what action was taken by the Commission upon these official matters.

Again, we direct your attention to Subsection 3 of Section 3. which states: "The State Soils District Commission shall provide for the execution of surety bonds for all of its employees who shall be entrusted with funds or property; shall provide for the keeping of a full and accurate record of all its proceedings and of all its resolutions, regulations and orders issued or adopted; and shall provide for an annual audit of all its accounts of receipts and disbursements." (Underscoring ours.) The underscored portion of the above quoted sentence plainly states that such a record of proceedings as you inquire about in question 2 must be kept, because the use of the word "shall" is mandatory and leaves the Commission no choice in this matter. There is no direct statement in the Act that these "full and accurate records" must necessarily be in the form of "minutes," but since there is no other possible manner, except through the keeping of minutes, in which a "full and accurate record of all proceedings" (underscoring ours) can be obtained, we deduce that this is what the Act intended, and that therefore the answer to your second question, is, that before the State Soil Districts Commission could legally call for a referendum on the establishing of a soil district, its minutes must show, at least substantially, the various things enumerated by you in your second question. From the record of the minutes, which you have submitted to us, we do not believe that they constitute a compliance with the mandate of the Act that a "full and accurate record of all proceedings" be kept.

Your third question is:

"Before a referendum can be called must the Commission formulate and fix rules for the holding of referendums upon the establishing of a soil district?"

Upon this point we call your attention to the Act, Section 3 of which is headed: "Establishing Commission--Its powers and duties." Subsection 4b of Section 3 states, as being among the powers and duties of the Commission: "To formulate and fix the rules and procedures for fair and impartial referendums on the establishing or disestablishment of soil districts * * *."

Following the above quoted subsection is Section 3a of the Act, entitled: "Referendum -- how conducted." Section 3a then proceeds to set forth certain rules which shall govern in the conduct of the referendum. It might, at first glance, appear that Subsection 4b of Section 3 of the Act places the obligation upon the Commission to formulate and fix the rules and proceedings for fair and impartial referendums on the establishing and disestablishment of soil districts, and that in Section 3a, following, they change their minds and fix the rules themselves. We, however, do not so interpret it, but rather are of the opinion that Section 3a merely sets forth certain things which shall and shall not be done in the holding of a referendum, and imposes upon the Commission the duty to formulate and promulgate such additional rules of procedure as are necessary for the fair and impartial conduct of a referendum. This view gains support from a close contemplation of Section 3a, which obviously does not furnish sufficient directive of itself for the conduct of a "fair and impartial referendum." Furthermore, we have no right whatever to assume that Section 3a of the Act was intended to invalidate Subsection 4b of Section 3, which is what we would have to do if we took the position that the Commission did not have the duty to "formulate and fix the rules and procedures for fair and impartial referendums on the establishing and disestablishment of soil districts." We would furthermore have to assume (if we held that the Commission did not have to formulate these rules) that it was the intention of the framers of the Act that Section 3a was intended to invalidate Subsection 4 of Section 3, which states: "In addition to the authority and duty hereinafter assigned to the State Soil Districts Commission, it shall have the following authority and duty: (b) To formulate and fix the rules and procedures for fair and impartial referendums for the establishing and disestablishment of soil districts * * *." (Underscoring ours.)

We have no reason or right to make the foregoing assumptions, all of which we would have to make if we found that the Commission was not obligated to formulate these rules. On the contrary, we must presume that the framers of the Act intended that every portion of the Act should be validated and given full effect. Our

answer therefore to your third question is that before a referendum can be called the Commission must formulate, fix and promulgate the rules and procedures for the conduct of such a referendum.

Your fourth question is:

"Must the minutes of the Commission show that a referendum is called on the establishing of the proposed district, and must the same show just how the referendum is to be conducted and where the polling places are and who the judges of the referendum shall be?"

This question, we believe, comprises within itself three questions, the first of which is:

"Must the minutes of the Commission show that a referendum is called on the establishing of the proposed district?"

For the reasons given in our answer to question 2 we believe that the minutes must so show.

The second part of your fourth question is:

"Must the same (the minutes) show just how the referendum is to be conducted?"

In view of our holding above, that it is the duty of the Commission to formulate and fix the rules and procedures for referendums, and of our further holding that it is the duty of the Commission to keep in its minutes a full and accurate record of all of its proceedings, and in view of the obvious fact that the formulation of rules and procedures for the holding of referendums are a part of the proceedings of the Commission, it is our opinion that the minutes of the Commission should show "just how the referendum is to be conducted."

The third part of your fourth question is:

"Must the minutes of the Commission show where the polling places are and who the judges of the referendum shall be?"

The language of this question indicates that your inquiry upon this point is whether, prior to the holding of the referendum, the minutes of the Commission "shall show" where the polling places are and who the judges of the referendum "shall be."

In our answer to your fifth and following question we will give as our opinion that the Commission may conduct such a referendum itself, or may appoint a person, or persons, to represent it in the holding of the referendum, and that in either case the Commission, or the person, or persons, referred to, should select the polling places and the judges and clerks. As these are part of the duties and proceedings of the Commission we believe that the places of polling, and the names of the judges and clerks, should appear in the minutes of the Commission after the referendum is held, but not necessarily before, inasmuch as it is our opinion that at the time when the Commission conducts the referendum, or at the time when the referendum is conducted by persons, or a person, representing the Commission, such polling places may be designated and clerks and judges selected.

Your fifth question is:

"Can the Commission, by order appearing in its minutes, appoint an individual or a group of individuals to select the polling places and name the judges and clerks of said referendum?"

Section 4 of the Act entitled: "Establishment of soil conservation districts--how." states: "* * *Upon reaching a favorable conclusion on these matters(the calling of a referendum), the Commission shall call for and conduct, or cause to be conducted, a referendum by ballot of land representatives within that area, on the question of establishing the county or the specified township or townships as a soil conservation district." (Underscoring ours.)

Section 9 of the Act, entitled: "Disestablishment of soil districts--referendum--procedure in case of disestablishment," states: "The State Soil Districts Commission, upon receiving at any time a petition for the disestablishment of any soil district, said petition being signed by not less than twenty-five land representatives in each township within the area covered by the petition, shall presently call for and conduct within that district a referendum upon the disestablishment of that district." (Underscoring ours.)

These two sections, which, we believe, complement each other, seem clearly to impose upon the Commission the duty of conducting referendums for the establishing and disestablishment of soil conservation districts. Conducting such referendum obviously entails the selection of polling places, and of judges and clerks to serve in such referendum. From the language of the sections quoted above it is our opinion that the Commission could conduct the referendum, which would include the selection of polling places, judges and

clerks. We believe, further, that by use of the phrase in Section 4 "or cause to be conducted," that the Commission could appoint a disinterested individual, or group of individuals, to select the polling places, and name the judges and clerks for the referendum. For the reasons given in our answer to your second question, such an order should appear in the minutes of the Commission.

Your sixth question is:

"Is the referendum held in Freedom township and Lexington township, Lafayette county, Missouri, on February 24, 1949, under the above stated facts, a legal and lawful referendum, and the result thereof under the minutes of the meeting of said Commission of November 22, 1948, and March 21, 1949, binding upon the proposed district and the inhabitants and landowners thereof."

It is the opinion of this office that the aforesaid referendum is not a legal and lawful referendum, binding upon the proposed district and the inhabitants and landowners thereof, because of the failure of the Commission to discharge adequately the duties imposed upon it in the steps preliminary to the holding of the referendum by the Act of the Legislature providing for the establishment of the State Soil Districts Commission.

We venture to add this further thought, although it is not embraced in any of the questions which you directed to us. In your letter to us you stated:

"On December 14, 1948, the Chairman of the Commission and the Extension Soil Conservationist met with the Lafayette County Sponsoring Committee in Higginsville. Following this meeting the Chairman wrote letters to J. W. Burch and F. V. Heinkel who with the Chairman constitute the executive committee of the Commission. The vote of the executive committee was two in favor of a public hearing, one against."

We deduce from this that one of the necessary preliminary steps to the holding of the referendum, namely, the determination of whether a public hearing was to be held, was taken, not by the whole Commission, but by an executive committee consisting of three members. We find nothing in the Act which would justify the taking of such a step by any number less than a majority of the whole Commission. The executive committee, you state, voted two to one in favor of a public hearing. On the contrary it seems to us that

Subsection 4 of Section 3 of the Act clearly implies that the concurrence of a majority of the whole Commission shall be required for the determination of any matter within their duties, which was not the fact in this instant case.

CONCLUSION

It is the conclusion of this department that members of the Missouri State Soil Districts Commission may not vote by mail upon matters pertaining to the duties of the Commission; that Commission proceedings must be fully recorded in the minutes of the Commission; that the Commission is required to formulate and fix rules for the holding of referendums; that it is the duty of the Commission to conduct referendums or to designate a disinterested and competent person, or persons, to do so; it is the opinion of this department that the failure of the Missouri State Soil Districts Commission to follow the procedure prescribed in the Act creating it will invalidate its actions; it is our further conclusion that the referendum election in this instant case is void because of the failure of the State Soil Districts Commission to adequately discharge the duties imposed upon it preliminary to the holding of the referendum, and that therefore the aforesaid referendum is not binding upon the persons who otherwise would be affected by it.

Respectfully submitted,

HUGH P. WILLIAMSON Assistant Attorney General

APPROVED:

J. E. TAYLOR Attorney General DANGEROUS INSANE PERSONS:

The County Jail is a suitable place for the confinement of a dangerous insane person within the meaning of Sec. 9336 R.S.A. Mo., 1939, pending the adjudication of the question of sanity.

2. The sheriff is not restricted by the Statute to the county jail as a place of confinement of such patients.

3. The State Hospitals are not available as places of confinement for such insane persons before they have been adjudicated insane by the court.

April 27, 1949

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Honorable Franklin W. Long Judge of the Probate Court Bates County Butler, Missouri

Dear Judge Long:

We are in receipt of your letter of March 23, 1949, in which you request an opinion of this department, your letter is as follows:

"Section 9336 Revised Statutes 1939, reads in part as follows:

..... Provided, however, if the affidavit filed in compliance with Section 9335 of this act states that the alleged insane person is so deranged as to endanger himself or others or would be dangerous to the safety of the community by being at large and is not being confined or restrained, the Judge or Clerk of the Probate Court may issue a Warrant authorizing the Sheriff to apprehend such alleged insane person and confine him or her in some suitable place for such time as may be necessary to carry to a determination the proceedings to inquire into the condition of the said alleged insane person and may, if in the opinion of the Judge issuing the warrant it is necessary, authorize one or more assistants to be employed. Said warrant shall be substantially in the following form.

"In this county and we presume in most counties of the third class, the Sheriff has no "suitable place" in which to confine a person alleged to be insane and in such a condition as to be dangerous to himself or the community.

"It has been our experience that in cases where the accused should be confined until a hearing is completed that the accused is generally in such condition that he needs medical attention, constant care and guarding. The County Jail is not a proper place for people in this condition; and the Sheriff is not prepared or able to handle people in this condition.

"We ask that you please furnish us an opinion as to whether or not the Sheriff, upon receiving a Warrant from the Probate Court as referred to in the above Section, has the authority to immediate deliver the accused to a State Hospital for the insane, to be held and cared for until such time as the Probate Court may have a hearing as provided by law to determine whether or not the accused is insane and to commit him to the State Hospital for treatment as a County Patient. Also as to whether or not the Superintendent of said State Hospital is required to receive said accused and hold him for the Sheriff; the "suitable place" referred to in the Statute being the State Hospital.

"Also we would like to have your opinion as to whether or not the Sheriff, taking into his custody the accused by a Warrant as provided in the above Statute, may arrange to confine the accused in a Private Institution pending disposition of the case and until the State Hospital will admit the Patient after he has been found to be insane and ordered committed; and if the Sheriff may incur the expenses of keeping the accused in a Private Institution and if the County is liable for said expenses."

The pertinent portion of Section 9336 R.S.A. Mo., 1939 is set forth in your above quoted letter. Said section also sets forth the form of warrant which shall be directed by the court to the sheriff. This form of warrant is as follows:

"Sta	te	of	Mi	ssou r1		12
Cour	ity	of	_			
The	Sta	te	of	Missouri,	to	

whereas, it appears that proceedings have been instituted for inquisition into the sanity of _______, and it appears to the satisfaction of the undersigned that the said alleged insane person is so deranged as to endanger himself or others and would be dangerous to the safety of the community by being at large, you are, therefore, commanded forthwith to arrest said person and confine him in some suitable place until the proceedings herein instituted have been determined, and you are authorized to take to your aid _____ assistants, if deemed necessary by you. After executing this warrant make return thereof to the office of the county clerk.

W1	tness	my	hand	this	 day	of	 19
	4						

Judge of the County Court."

In your aforesaid letter you express yourself as believing that the county jail is not a suitable place of confinement for a dangerous insane person pending adjudication on the matter of sanity and you point out the lack of facilities for medical attention, which you correctly say is usually needed by such patients.

We quite agree with you that the county jail is not a suitable place of confinement for such patients from the standpoint of affording the necessary curative facilities, but we are of the opinion that it is a suitable place for this confinement, which is of a very temporary nature, within the meaning of the statute above quoted.

We are of this opinion for the reason that the outstanding purpose of the section is the restraint of a dangerous person in order to prevent his harming himself or others and in order to prevent his menacing the safety of the community. We are of the opinion that confinement in the county jail should prevent all of these dangers which the aforesaid section is designed to provide

against. It is to be assumed that in all jails reasonable measures are resorted to in order to prevent persons from inflicting self injury whether such persons be sane or insane and certainly the confinement of a dangerous insane person in the jail would protect the outside world from any violence which he might perpetrate if he were at large. We are therefore of the opinion that in view of the fact that confinement of a dangerous insane person in the county jail for the days pending the adjudication of the question of sanity accomplishes the purposes of the statute, it is therefore logical to hold that confinement of such a person in the county jail is confinement in a suitable place within the meaning of said section.

In further support of the opinion expressed above we call attention to the fact that section 9340 R.S.A. Mo., 1939 provides that if the court finds the insane person to be dangerous it shall so state in its order and authorize the sheriff to hold the insane person in the county jail or other safe place until such time as he is admitted to the state hospital. Said section 9340 is as follows:

"If the court at the hearing finds that a person is dangerous either to himself or the person or property of others or that he would endanger the community by being at large, such finding shall be stated in the order of court and shall authorize the sheriff to hold the insane person in the county jail or other safe place until such time as admission may be had at the state hospital to which he has been committed."

We are of the opinion that after construing section 9336, supra, and 9340, supra, together it is logical to conclude that since the legislature considered the county jail a fit place in which to confine a dangerous insane person during the period of time between the adjudication and the admission of the patient to the state hospital it also considered such county jail as a suitable place in which to confine a dangerous insane person pending adjudication. It should be borne in mind, however, that the legislature did not in either section designate the county jail as the only suitable or safe place for confinement of such patients.

We are of the opinion that the statute does not limit the sheriff to the county jail as a place of confinement for such insane persons. We base this opinion on the use in the section

of the very broad expression "in some suitable place". which discription would be satisfied by any decent place of confinement sufficient to hold or confine a patient and where reasonable precautions might be provided against the infliction of self injury by the patient. Our holding to the effect that the sheriff may choose any suitable place of confinement for a dangerous insane person leads us to the consideration of the direct question as to whether or not the sheriff has the authority to deliver dangerous insane persons to the state hospital immediately upon receipt of the warrant and whether the superintendent of the state hospital is required to receive the patient pending adjudication. In answer to this question we call attention to the fact that the law provides only two methods whereby patients may be admitted to a state hospital. One method applies to pay patients and is set forth in sections 9323, 9324 and 9325 R.S.A. Mo., 1939, which sections cortain no provisions authorizing a superintendent of a state hospital to receive patients pending a sanity hearing. The other method applies to insane persons who are poor and unable to pay. These persons are to be paid for by the county as set forth in section 9328, R.S.A. Mo., 1939, after being adjudicated insane. This statute does not contain any provision from which it may be implied that it is the duty of a superintendent of a state hospital to accept dangerous insane patients pending an adjudication as to their sanity and since no section of the statute pertaining to acceptance of such patients by state hospitals provides for acceptance of such patients pending adjudication we are of the opinion that state hospitals are not available for such patients until after they have been adjudicated insane.

We shall next consider the question as to the right of sheriffs to confine a dangerous insane person in a private institution pending adjudication and to charge the county with the expense resulting. We are of the opinion that the sheriff has the right under section 9336 to confine the patient in a suitable private institution, but that in view of the fact that the county jail is also a suitable place of confinement for such patients pending adjudication within the meaning of the statute, he would not have the authority to obligate the county to pay such private institution when a county has a cheaper suitable place as the county jail available.

CONCLUSION.

We are therefore of the opinion that under section 9336, R.S.A. Mo., 1939, the sheriff has authority to confine a dangerous

insane patient in the county jail pending adjudication and that said county jail is a suitable place of confinement within the meaning of the statute.

We are of the further opinion that the sheriff may confine such dangerous insane person in any other suitable place of confinement available, but that the county is not chargeable with the obligation to pay therefor, since it has available a county jail which is a suitable place of confinement of such a patient within the meaning of the statute.

We are of the further opinion that the state hospitals are not available for use by the county sheriff as places of confinement for dangerous insane persons prior to the adjudication of insanity.

Respectfully submitted,

SAMUEL M. WATSON Assistant Attorney General

APPROVED:

J. E. TAYLOR Attorney General PAROLE, AND TERMINATION)
THEREOF BY THE CIRCUIT)
COURT:

) When the Circuit Court grants a parole to) a convict who is a first offender and who) has been sentenced to the penitentiary, said) parole when terminated by order of Court)) directing Circuit Clerk to place in hands of) Sheriff copy of the sentence and certificate) certifying that parole has been terminated,) parole is at an end and may not be revived) by any subsequent action of the Court.

May 25, 1949

Honorable R. G. Mayfield Prosecuting Attorney Laclede County Lebanon, Missouri FILED 56

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Dear Sir:

This will acknowledge your letter in which you request an opinion of this department, your letter is as follows:

"On July 26, 1947, a defendant entered a plea of guilty in the Circuit Court of Laclede County to the charge of grand larceny. He was sentenced to three (3) years in Algos and, on the same day he was paroled by the Court. From time to time thereafter, he was continued on parole until May 3rd, 1948, when the Circuit Court terminated his parole. This action was taken because the defendant had been convicted in April, 1948, of breaking and entering a United States Post Office, and sentenced by the Federal Court to a year and a day in the United States Reformatory in El Reno, Oklahoma. On the same day his parole was terminated, a copy of the commitment order revoking said parole was handed the Sheriff, and eventually was mailed to El Reno as a detainer upon the defendant.

"Does the Circuit Court have authority to set aside the order terminating the parole upon his release from El Reno, and permit the defendant to again be on parole status from our Court? Does the Court lose authority to set aside a termination of the parole after the term of Court in which the termination was ordered and before the defendant is delivered to the Superintendent of Algoa."

Supplementing the statement of facts in your letter with certain assumptions which we believe are warranted, we are convinced that the relevant facts to be considered are as follows:

- l. The defendant, a first offender, was convicted of grand larceny, a felony, in the Circuit Court of your county on July 26, 1947, and sentenced on the same day to three years imprisonment at Algoa, which is a part of the penitentiary.
- 2. He was paroled by the Court on the same day that he was sentenced.
- 3. From time to time he was continued on parole until May 3, 1948.
- 4. In April, 1948, he was convicted by the Federal Court of breaking and entering a United States Post Office and sentenced to a term in a federal penitentiary in Oklahoma.
- 5. His parole was terminated by the Circuit Court of your county on May 3, 1948, a short time after his conviction in the Federal Court.
- 6. A copy of the commitment order revoking the parole was handed the sheriff and transmitted to the federal prison as a detainer.

We assume that this last act was done in conformity with the provisions of Section 4202, R.S. A. Mo. 1939, which section sets forth the procedure to be followed by the Circuit Court in the termination of paroles and which section also provides that the clerk should be ordered by the Court to make a certificate certifying the termination of the parole, and to deliver such certificate together with a copy of the sentence into the hands of the Sheriff.

With the above outlined facts in mind it occurs to us that the first question to consider is whether or not the Circuit Court even within the term has the power to set aside its termination of a parole after the certificate eertifying the termination and a copy of the sentence has been placed in the hands of the Sheriff as provided by law. If this question be answered in the negative it disposes of the question as to whether the court can set aside its termination of the parole after the expiration of the term during which the termination was made.

In considering the authority of the court in such matters within term time we should have in mind the section of the Statute vesting in the court the authority to grant a parole to such a convict as is involved in this statement of facts, and the section of the statute providing for the termination of such parole, if it shall be terminated, and prescribing the procedure for such termination.

Section 4201, R.S.A. Mo. 1939, is the section applicable to the granting of a parole to a convict of the class to which the man involved in your statement of facts belongs, or in other words, a convict who is a first offender sentenced to the penitentiary. Said section, with the immaterial portions thereof omitted is as follows:

"When any person of previous good character and who shall not have been previously convicted of a felony shall be convicted of any felony except " " ", and imprisonment in the penitentiary shall be assessed as punishment therefor, and sentence shall have been pronounced, the court before whom the conviction was had if satisfied that such person, if permitted to go at large, would not again violate the law, may in his discretion, by order of record, parole such person and permit him to go and remain at large until such parole be terminated as hereinafter provided: Provided, that the court shall have no power to parole any person after he has been delivered to the warden of the penitentiary."

The convict involved in your case was convicted of grand larceny and sentenced to three years at Algoa, and immediately paroled under the section above quoted. Section 4202, R.S.A. Mo. 1939, specifically prescribes how the circuit court shall terminate a parole granted under the provisions of section 4201, above mentioned, said section 4202, insofar as it is relevant to the matters involved in this opinion is as follows:

"When any person shall be paroled under the provisions of section 4201 of this article the court granting said parole or the judge thereof in vacation may terminate said parole at any

time without notice to such person by merely directing the clerk of the court to make and deliver to the sheriff or other proper officer a certified copy of the sentence, together with a certificate that such person has been paroled and his parole has been terminated and it shall be the duty of such officer upon receipt of such certified copy of sentence to immediately arrest such person and transport and deliver him to the warden of the penitentiary in the same manner as if no parole had been granted, " * "."

We call your attention to the fact that the circuit court derives its authority to parole a convict from the statute alone and that the applicable statutes relating to parole are as much a part of the judgment of conviction as if incorporated into the judgment. The following is a quotation from the opinion of Judge Gantt in State ex rel. Gentry, Attorney General vs. John C. Montgomery, Judge of 12th Judicial Circuit, 317 Missouri 811:
"The parole law of this state is a part of the penal code, and as such becomes a part of every judgment of conviction in every criminal case, as much as if it were written into the judgment of the court."

We suggest the fact that since the parole procedure is purely statutory the provisions of the statutes must be strictly followed in procedural matters relating to parole.

We are therefore, of the opinion that the procedure in the matter of the termination of paroles must exactly conform to the provisions of section 4202 above quoted. This section sets forth the procedure in very definite terms when it provides in substance that the judge may terminate the parole by directing the clerk to make out and deliver to the sheriff a certified copy of the sentence and a certificate certifying that the person has been paroled and that his parole has been terminated.

We are of the opinion that when the judge of a circuit court enters an order of record directing the clerk to deliver a certified copy of the sentence and a certificate certifying that the person convicted has been paroled and that his parole has been terminated the parole is at an end and is no longer in existence by reason of the fact that the court procedure for the

termination thereof set forth in the above quoted section has been followed. We are of the opinion that said parole cannot be revived by any subsequent order of the court which undertakes to set aside the procedure theretofore completed, whether such order be made during the same term during which such procedure was completed, or at a time subsequent to the end of said term. We are of this opinion because while the court may by amending an order previously entered, change the course of events which have not yet transpired, it cannot by amendment of an order previously entered undo things which have been definitely accomplished and completed pursuant to the order before it was amended. We are of the opinion that it is obvious that when the parole was terminated it went out of existence forever and that the convict cannot be again on parole unless a new parole be granted, and we comment that the statute does not grant to the court the right to grant a second parole to such an offender.

CONCLUSION.

Referring again to your statement of facts, it is clearly apparent that the termination of the parole insofar as procedure by the circuit court is concerned was complete when the copy of the commitment order revoking the parole was placed in the hands of the sheriff, and we are therefore of the opinion that the procedure followed by the court in terminating the parole cannot be set at nought by any subsequent order of the court undertaking to set aside the said procedure whether such order be entered within term time, or after the expiration of the term. We are accordingly of the opinion that the parole in question has been effectively terminated and cannot be revived.

Respectfully submitted,

SAMUEL M. WATSON Assistant Attorney General

APPROVED:

J. EL TAYLOR Attorney General COUNTY SWRVEYOR:

County surveyor cannot make charge exceeding

FEES:

the amount set out in the statutes.

January 31, 1949

Honorable R. G. Mayfield Prosecuting Attorney Laclede County Lebanon, Missouri



Dear Sir:

Your letter requesting an opinion of this department reads as follows:

"The surveyor of Laclede County has requested that I obtain an opinion from you on the question of whether he could enter into an agreement with a person requesting a survey for a charge exceeding the amount set out in Section 13425.1, Laws 1935, Page 1541, Section 1, and Section 13206, R.S. of Missouri, 1939. He advises me that it is utterly impossible to perform the duties of the office at the rate of pay set out in the statutes."

Laclede County is a county of the third class. Section 13425.1, Laws of Missouri, 1945, page 1541, provides for the compensation of county surveyors in counties of the third class, setting out a schedule of fees to be allowed them for their services. Section 13206, R.S. Mo. 1939, provides for the compensation of chainmen and markers at the rate of two dollars for each day actually employed, to be paid by the party requesting the survey. The question presented is whether the county surveyor may enter into an agreement for a charge exceeding the amount set out in these statutes. In point with this question, the court, in Nodaway County vs. Kidder, 129 S.W. (2d) 857, said, 1.c. 860:

"The general rule is that the rendition of services by a public officer is deemed to be gratuitous, unless a compensation therefor is provided by statute. If the statute provides compensation in a particular mode or manner, then the officer is

confined to that manner and is entitled to no other or further compensation or to any different mode of securing same. Such statutes, too must be strictly construed as against the officer. * * *"

The county surveyor is a public official whose compensation is provided for by Section 13425.1, supra. He is limited by the schedule of fees in this section and by Section 13206, supra, in making charges for services performed, and cannot enter into an agreement for a charge exceeding the amounts set out in these statutes.

CONCLUSION

It is the opinion of this department that a county surveyor of a third class county cannot enter into an agreement with a person requesting a survey for a charge exceeding the amount set out in Section 13425.1, Laws of Missouri, 1945, page 1541, and Section 13206, R.S. Mo. 1939.

Respectfully submitted,

RICHARD H. VOSS Assistant Attorney General

APPROVED:

J. E. TAYLOR Attorney General OFFICERS: PUBLIC BUILDINGS:

Public officers need not accept low bid for a building when, in their discretion, the low bid is not the best bid.

February 24, 1949



Hon. Samuel Marsh Director Department of Public Health and Welfare Jefferson City, Missouri

Dear Sir:

This is in reply to your request for an opinion, which reads as follows:

"In a recent advertisement for bids on a certain State project we did not state in the form of advertisement for bids that the State reserves the right to reject any or all bids, as we have done in some former advertisements, but the following paragraph did appear in the advertisement:

'Plans and specifications, forms on which bids must be made, conditions of bidding, information regarding deposits, bid bond and statutory preference for Missouri products may be obtained at the office of John F. Powell, Director of Public Buildings, Jefferson City, Missouri.'

"In the copy of the specifications which was given to each bidder by the Director of the Division of Public Buildings there appeared a proposal sheet on which the contractors made out their estimates and which they signed as their official bid. The last paragraph of this proposal, which appeared above the contractor's signature, was as follows:

'In submitting this bid it is understood that the right to reject any and all bids has been reserved and that this bid may not be withdrawn for a period of thirty days from the opening thereof.'

"After a careful check of the quality of work turned out by the lowest and the next lowest bidder we consider it to be in the interest of the State to let the contract to the next lowest bidder.

"Please advise whether we can legally let this contract to the second lowest bidder."

The letting of contracts for the erection or construction of any building, improvement, alteration or repair, by public officials of the State of Missouri is governed by the provisions of Section 14939, R. S. Mo. 1939. That section provides, generally, that no contract shall be made for the purposes mentioned above without first advertising for bids in certain newspapers, and that the number of such public bids shall not be restricted or curtailed but shall be open to all persons complying with the terms upon which such bids are requested or solicited.

In your letter you state that you desire to reject the low bid on a certain project because your investigation has disclosed that the low bidder was not reliable. We feel that the rule as stated at length in 45 Am. Juris. dealing with Public Works and Contracts, fully answers the question. At page 784, ff., it is stated:

"Statutes and ordinances governing letting of public contracts by public authorities variously require such contracts to be awarded to the 'lowest bidder.' 'lowest and best bidder, 'Lowest responsible bidder,' and the fact, therefore, that a bid is in terms of dollars and cents the lowest of those which have been submitted is not necessarily the determining factor in the letting of the contract. As a matter of fact, most statutes contemplate the letting of the contract to the lowest bidder only if he is a competent and responsible contractor having the facilities and the ability to execute the contract properly. Much litigation has arisen concerning the construction of these provisions relative to the bidder to whom the contract may or must be let and the discretion which may be exercised in awarding contracts. * * *

"* * * What the public desires is a wellconstructed work, for which a lawsuit even
against a responsible defendant is a poor
substitute; and authorizations of this kind
are held to invest public authorities with
discretionary power to pass upon the honesty and integrity of the bidder necessary
to a faithful performance of the contract - upon his skill and business judgment, his

experience and his facilities for carrying out the contract; previous conduct under other contracts; and the quality of previous work -- as well as his pecuniary ability, and when that discretion is properly exercised the courts will not interfere. All matters bearing upon the likelihood that the contract will be promptly and efficiently performed bear upon the question of responsibility of bidders and may and should be considered in determining who is the lowest responsible bidder. * * *

"Public authorities, when not compelled to award public contracts to the one offering the lowest pecuniary bid, but authorized to award contracts to the lowest responsible bidder, lowest and best bidder, etc., are not limited in their selection to the lowest pecuniary bid by reason of the fact the bidder has furnished a bond for the faithful performance of his contract, but as in other cases may take into consideration all other pertinent factors and elements, such as business judgment, capacity, skill, etc., of the bidder, exercising wise and honest judgment in determination of the question of responsibility. The public interest is better subserved and promoted by faithful performance by the contractor than by resort to indemnity, since in the very nature of things such remedy is inadequate and too often entails litigation, expensive delays, and damages which cannot be adequately measured or compensated.

"When the controlling statute or ordinance requires without qualification the letting of public contracts to the lowest bidder, the duty of awarding the contract is generally held to be ministerial and not judicial, and must be performed without exercise of discretion, that is to say, the contract must be awarded to the one whose bid is actually the lowest. Usually, however, as pointed out above, the contract is not required to be awarded to the lowest bidder,

without qualification, but is to be awarded to the 'lowest responsible bidder,' 'lowest and best bidder,' etc., and there is but little dissent from the general rule that in determining who is such 'lowest responsible bidder,' 'lowest and best bidder,' etc., public boards and officials are vested with wide discretion, and their decision, when based upon an honest exercise of the discretion thus vested in them, will not be interfered with by the courts, even if erroneous. * * *

Where there is no statutory limitation upon the power to award public contracts, the whole subject matter is within the control of the public officers, provided they do not actually exceed their power or invade private rights, and they are left to their sense of official duty and responsibility; but they must act with due fidelity to the public and for the interest of the public, in good faith, with reasonable and ordinary care and diligence, and without fraud, collusion, corruption, or palpable abuse of discretion.

"The public authorities must always exercise a real discretion based upon facts reasonably tending to support their decision: the rule does not permit them to act arbitrarily. While an honest determination that a bidder's bid, though the lowest, is not the best, will ordinarily control, the law does not permit the arbitrary rejection of bids for public work nor arbitrary preference of one bid over another which is lower, or an arbitrary classification of bidders. The award must be made honestly and in good faith; public authorities may not fraudulently cast upon taxpayers a substantially larger burden than necessary, and when it appears that they have so acted, the courts will interfere. All else being equal, it is the duty of the public authorities to accept the bid involving the least expenditure of public funds.

"* * * Frequently, either by statute or by the terms of the advertisement for bids, the right to reject any or all bids is reserved. Such a reservation is generally held to vest in the authorities a wide discretion as to who is the best as well as the lowest bidder, and this involves inquiry, investigation, comparison, deliberation, and decision, which are quasi-judicial functions, and, when honestly exercised, may not be reviewed by the courts. * * *" (Underscoring ours.)

Since Section 14939, supra, does not require that public officials in the State of Missouri let a contract to the low bidder, we think that the authorized officials are vested with discretion as to the letting of contracts for public works in this state. However, it must be kept in mind that the officials must act with due fidelity to the public and for the interest of the public, in good faith, with reasonable and ordinary care and diligence, and without fraud, collusion, corruption, or palpable abuse of discretion.

The law does not permit the arbitrary rejection of bids for public works or arbitrary preference of one bid over another which is lower. All else being equal, it is the duty of the public officers to accept the bid involving the least expenditure of public funds.

Conclusion.

Therefore, it is the opinion of this department that public officers authorized to let contracts for public buildings may reject the lowest bidder upon a finding that the acceptance of such bid would not be in the best interest of the public. However, the public officers so acting must be in good faith, the award must be made honestly and without fraud, collusion, corruption, or palpable abuse of discretion.

Respectfully submitted,

JOHN R. BATY Assistant Attorney General

APPROVED:

J. E. TAYLOR Attorney General MAGISTRATES:
JURORS:
FEES AND
COMPENSATION:

Person summoned as juror under provisions of Section 15a, Laws of 1947, Vol. I, page 248, and who appears in court but whose name is scratched, receives compensation and mileage provided in such section.

March 10, 1949



Honorable Aubrey R. Marshall Judge, Probate and Magistrate Courts Randolph County Moberly, Missouri

Dear Sir:

This is in answer to your letter of recent date requesting an official opinion of this department and inquiring whether or not those persons summoned as jurors under provisions of Section 15a, Laws of Missouri, 1947, Volume I, page 248, but whose names are scratched, are to receive the compensation and mileage provided in such section.

We are enclosing an official opinion of this department rendered to Honorable Wayne T. Walker under date of September 11, 1947, construing Sections 10 and 10a of the act in which Section 15a supra appears. We believe that the enclosed opinion is determinative of the question presented in your opinion request insofar as such opinion holds that "serve as such" means with regard to jurors appearing in court in response to a summons and is not limited to the actual serving as a member of a jury hearing a case. We believe that the phrase "serve as such" used in Section 15a of the act to have the same meaning. Therefore, we believe that under the provisions of Section 15a, a person who is summoned as a juror and appears in court but whose name is scratched is entitled to the compensation and mileage provided in such section.

CONCLUSION

It is the opinion of this department that a person summoned as a juror under provisions of Section 15a, Laws

of Missouri, 1947, Volume I, page 248, and who appears in court in response to such summons but whose name is scratched, is entitled to the compensation and mileage provided in such section.

Respectfully submitted,

C. B. BURNS, JR. Assistant Attorney General

APPROVED:

J. E. TAYLOR Attorney General

CBB: VLM

Enc.

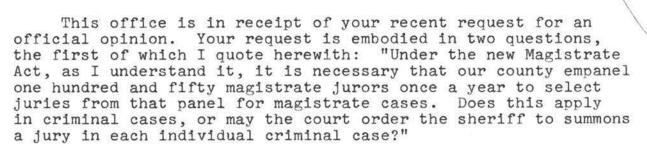
TRIAL AND PANEL: MAGISTRATE JURIES:

Magistrate may obtain jury panel from county panel or by summons. Jury should be twelve in number unless less number agreed upon. Panel should consist of twenty-four.

March 28, 1949

Mr. W. V. Mayse Prosecuting Attorney Harrison County Bethany, Missouri

Dear Sir:



Your first question, quoted above, is in reality two questions, the first of which is in regard to the manner in which magistrate jurors are selected. In answer to this we would call your attention to Volume 1, Laws of Missouri 1947, page 248, which states:

Section 1. "Within thirty days after this act becomes effective and thereafter as often as may be necessary to supply juries to the magistrate courts of the county, and at least once each year on or before the first day of May, the county court shall select names of not less than four hundred persons having all of the qualifications of jurors; and in selecting such names the court shall select such number of persons from each township as the population of such township bears to the population of the entire county. No person shall be selected who has served on any grand, petit or magistrate jury within one year from the time of making the selection. The names and addresses of the persons selected from each township shall be written



on separate slips of paper of the same kind and size and placed in a box with a sliding lid and thoroughly mixed."

Section 2. "The county court, after consultation with the magistrate or magistrates of the county, shall estimate the total number of jurors that may be required by all such magistrate courts for a period of not less than three months nor more than twelve months, but in no case shall such number be less than 144. The number of jurors to be drawn from each township in the county shall bear the same ratio to the total number of jurors to be selected as the population of the township bears to the total population of the county."

Section 3. "(a) The clerk of the county court, so situated as to be unable to see the names on such slips, shall publicly in the presence of the county court and in open court, proceed to draw out names separately and singly from one township until he gets the number of names required from such township, and in the same manner shall continue to draw names from each of the remaining townships until he shall have drawn the total number of names determined by the county court. The names so drawn shall be recorded and numbered in the order fixed by the county court so as to insure that each panel of twenty-four jurors shall include, as nearly as practicable, persons from all parts of the county.

- "(b) The clerk of the county court shall send by United States mail to each person whose name has been selected in accordance with this act a notice reciting that such person has been selected for jury service in the magistrate court and that he will be further notified by the court requiring such service of the date when such service will be required.
- "(c) Provided, however, that in counties now containing or which may hereafter contain over 200,000 inhabitants and less than 700,000 inhabitants, the Board of Jury Commissioners shall select the jurors to serve in the Magistrate Courts from the regular Circuit court jury wheel and under the same method

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and procedure as Circuit Court jurors are selected; and said jurors shall be summoned in the same manner as Circuit Court jurors are summoned."

Section 4. "Upon the request of any magistrate or magistrate court, the clerk of the county court shall certify to the magistrate the first twenty-four names appearing on the jury list established under this act, and upon such certification he shall strike from the list the names so certified, and shall proceed in like manner upon each subsequent request."

Section 5. "In all counties wherein by law grand and petit jurors are selected by a board of jury commissioners, such board of jury commissioners and the clerk thereof shall perform the duties hereby imposed on the county court and county clerk and shall proceed in the manner herein prescribed."

You will note that the last quoted section (Section 5) states that in all counties wherein by law grand and petit jurors are selected by a board of jury commissioners, that such board shall perform the work of selecting magistrate court jurors which Section 1, quoted above, imposes upon the county court. This board of jury commissioners in 3rd and 4th class counties is composed as is set forth in Section 704a, page 275, Vol. 2, Laws Missouri 1947, which section states:

"In each county of the third and fourth class the clerk of the circuit court and the judges of the county court together with the circuit judge as provided in Section 13394, Revised Statutes of Missouri, 1939, a majority of whom shall constitute a quorum for the transaction of business, shall constitute a board of jury commissioners for their respective counties. The clerk of the circuit court of such counties shall be ex-officio clerk of the board of jury commissioners, and his duty shall be to assist the board in the performance of the clerical part of their work, and such clerk shall perform such other duties and services as may be required of him by the board or any member thereof, with respect to the things to be done by the board of jury commissioners, as provided by law. The time, place and manner of meetings of the board, and rules for performing its duties shall be fixed by the board."

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It will be seen therefore that in counties of the 3rd and 4th class (which includes your county) the board of jury commissioners selects the magistrate jury panels, and not the county court.

The above quoted sections, 1 through 5, Laws of 1947, Vol. 1, P. 248-249, and Section 704a, Laws 1945, Vol. 2, P. 275, set out a method which may be followed for getting jury panels in both civil and criminal cases for magistrate courts.

We now direct your attention to Section 15a, Laws 1947, Vol. 1, P. 251, which states:

"In any county now or hereafter having a population of less than 70,000 inhabitants, the magistrate or magistrates may, by order of record, direct that jurors be selected by issuing a summons to the sheriff or other officer ordering him to summons the appropriate number of jurors. In such event, each juror summoned shall receive one dollar per day for every day he may actually serve as such, and five cents for every mile he may necessarily travel going from his place of residence to the place where the trial is held, and such fees and expenses shall betaxed as costs in the particular case tried. In the event that the magistrate or magistrates make the order herein provided for, the order shall have the effect of suspending the provisions of this act in the selection of the general county panel and the selection of jurors thereunder; and such provisions shall remain suspended until such order is rescinded."

From the above it will be seen that a magistrate judge may, if he so desires, obtain a jury panel for civil and/or criminal cases, by directing that jury panels be selected by issuing a summons to the sheriff ordering him to summons the appropriate number of jurors. In an official opinion rendered by this office on September 5, 1947, on this point, this office held: "This department is of the opinion that when the magistrate makes the order for selecting and summoning a jury as provided in Section 15a of S.B. 107, that Sections 1 through 8, inclusive, (of S.B. 107), which provide for the selection of the general county panel and summoning the jurors thereunder, are suspended * * *." The plain meaning of all this would appear to be that a magistrate in 3rd and 4th class counties may get his jury panel from the panel selected by the board of jury commissioners in all magistrate court cases, both civil and criminal;

or he may get all of his jury panels for both civil and criminal cases by ordering the sheriff to bring in the needed number of jurors wherever he can get them, thus obtaining what is generally called a "pick-up jury"; or he may use both of the above described methods, using each as much or as little as he chooses in both civil and criminal cases; or he may use the regular panel selected by the board of jury commissioners for civil cases, and the "pick-up" method for criminal cases; or the other way around.

We do believe, however, that it is mandatory upon the board of jury commissioners in 3rd and 4th class counties to select the county panel for magistrate courts inasmuch as Section 1, Laws 1947, Vol. 1, Laws 1947, Vol. 1, P. 248, stated: "Within thirty days after this act becomes effective and thereafter as often as may be necessary to supply juries to the magistrate courts of the county, and at least once each year on or before the first day of May the county court shall select names of not less than four-hundred persons having all the qualifications of jurors; and in selecting such names the court shall select such number of persons from each township as the population of such township bears to the population of the entire county.* * *" It would seem plain therefore that this county panel for magistrate court's use must be selected although the magistrate judge may not use any of it.

Your second question is: "In misdemeanor cases, under the new magistrate court act, may defendants insist on a twelve-man jury to be selected from a panel of eighteen in the absence of any agreement of a lesser number by defense counsel and prosecuting attorney?"

The second question, like your first, is in reality two questions, the first of which is: "May a defendant, on trial in a magistrate court charged with a misdemeanor, insist on a jury of twelve, in the absence of any agreement between the prosecuting attorney and the counsel for the defendant, for a lesser number?"

In regard to the above we call your attention to Section 21, Laws of 1945, page 755, which in this connection states:

"All jury trials before a magistrate shall be by a jury of twelve persons, unless a less number shall be agreed upon, but not less than six."

This section has reference to criminal (misdemeanor) cases. We call your further attention to Section 98, Laws of Missouri 1945, page 794, which states:

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"Before the magistrate shall commence an investigation of the merits of the cause, by an examination of the witnesses or the hearing of any other testimony, either party may demand that the cause be tried by a jury, which jury shall be composed of twelve good and lawful persons having the qualifications of jurors in the circuit court, unless the parties shall agree on a less number, in which case the jury shall consist of the number agreed upon, not less than six."

This above partially quoted section has reference to both civil and criminal cases. From the above it will be seen that a defendant in magistrate court in both civil and criminal cases may have a jury composed of twelve persons, unless his lawyer and the prosecuting attorney or the attorney for the plaintiff, as the case may be, agree upon a less number, which shall not be less than six.

The second part of your second question (rephrased by us) is: "What shall be the size of the jury panel in the case of a twelveman jury, and what shall be its size in the case of a six-man jury."

In regard to this we would call your attention to Section 99, Laws of Missouri 145, page 794, which states:

"The magistrate shall issue a summons directed to the sheriff or other officer provided by law, commanding him to summon eighteen, or six more than the parties may have agreed upon, good and lawful persons of the county, qualified to serve as jurors in the circuit court of the said county, who shall be nowise of kin to either party, nor interested in the suit, to appear before such magistrate at a time and place named therein to make a jury for the trial of the action between the parties named in the summons." (Underscoring ours.)

You will note that this section calls for a panel of eighteen persons when there is to be a twelve-man jury, and a panel of twelve if, by agreement, the jury is to be six in number. However, this Section 99 was repealed by the Laws of 1947, Vol. 1, P. 248, and the repealing act and the sections enacted under it do not explicitly state the number to be on the magistrate jury panel. However, Section 3 of this above-mentioned repealing act, Laws of Missouri 1947, Vol. 1, P. 248, which relates to the selection of the county magistrate jury panel, states in part:

"The names so drawn (for the county panel) shall

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be recorded and numbered in the order fixed by the county court (now the board of jury commissioners in third and fourth class counties) so as to insure that <u>each panel</u> of <u>twenty-four jurors</u>, shall include, as nearly as practicable, persons from all parts of the county."

From the above it would appear to be the plain intent of Section 3 that in all magistrate court jury cases, both civil and criminal, the jury panel should number twenty-four, whether the jury is to be twelve in number or six. Furthermore, there is nothing to indicate that if the magistrate does not obtain his jury panel from the county panel provided by the board of jury commissioners, but obtains his panel by the procedure designated in Section 15(a), Laws of Missouri 1947, Vol. 1, p. 251, that he may legally use a less number than twenty-four on his panel.

We would call your further attention to Section 705, Mo. R.S.A., which states:

"The county court of each county at a term thereof not less than thirty days before the commencement of the circuit court or other court having civil and criminal jurisdiction, or civil or criminal jurisdiction, shall select names of not less than four hundred persons having all requisite qualifications of jurors; and the court in selecting such names shall select, as near as practicable, the same number from each township in the county according to the relative population, and shall determine how many petit jurors and alternate petit jurors shall be selected from each township in said county and the names of such persons and the township from which they are selected shall be written on separate slips of paper of the same size and kind and all the names so selected from any one township shall be placed in a box with a sliding lid to be provided for that purpose and thoroughly mixed." (Underscoring ours.)

Your attention is further directed to Section 706, Mo. R.S.A., which states:

"The clerk of the county court so situated, as to be unable to see the names on such slips shall, publicly, in the presence of said court and in open court, proceed to draw out names separately and singly from one township until he gets the number of names

required from such township for petit jurors and an equal number as alternate jurors to serve on petit juries if summoned; and in the same manner shall continue to draw names from each of the remaining townships, separately and singly, until he shall have drawn the names of twenty-four persons who shall serve as petit jurors at the next ensuing term of said court for which said petit jurors are drawns, and the names of twenty-four persons to be designated as alternate petit jurors, the names of said alternate petit jurors to be recorded and numbered consecutively from one to twenty-four, inclusive, in the order in which they are drawn: Provided, that in all cases where the county court shall fail to select such jurors and alternates according to the provisions of articles 1 and 4 of this chapter the sheriff of the county shall summon such petit jurors from the several townships in the county, according to their respective populations, as nearly as may be, and not less than ten days before the first day of the term of the court for which such jurors are summoned; and the sheriff when ordered by the court demanding such jury shall summon petit jurors during such term from the bystanders, after the list of alternate petit jurors has been exhausted; and provided further, that no person shall be summoned as such standing juror twice within the period of one year in any court of record." (Underscoring ours.)

CONCLUSION

It is the conclusion of this department that it is the duty of the board of jury commissioners in third and fourth class counties to select, at least once each year, a county jury panel for magistrate courts, which panel shall number not less than one hundred and fourty-four qualified jurors.

It is our further conclusion that the magistrate may draw upon this panel for juries in both civil and criminal cases; or in either civil or criminal cases; or that he may not use this jury panel at all, but may order the sheriff to bring in the needed number of jurors wherever he can get them, to compose a jury panel for both criminal and civil cases.

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It is our further conclusion that in lieu of an agreement between both plaintiff and defendant, in the trial of a case in magistrate court, for a jury of less in number than twelve, but not less than six, that juries in magistrate courts in both civil and criminal cases shall be twelve in number.

Respectfully submitted,

HUGH P. WILLIAMSON Assistant Attorney General

APPROVED:

J. E. TAYLOR Attorney General

HPW:mw

ADOPTION OF MINORS:

CONSENT; NOTICE TO PARENTS:

When consent of parents may be dispensed with; notice of proceedings must be served on parents.

April 7, 1949

Mr. R. G. Mayfield Prosecuting Attorney Laclede County Lebanon, Missouri



Dear Sir:

Your request for an opinion of this department has been received and reads as follows:

"An opinion is requested with reference to Section 9609, Laws of Missouri, 1937 Volume 2, Page 214.

"Over a year ago, the Circuit Court, after due notice to the parents and after an opportunity to be heard, declared a child to be a neglected child and it was made a ward of the Circuit Court. The custody of the child was taken from the parents, and placed in the Laclede County Welfare office. The child was then removed from the home of the parents. and has been in a home unknown to the parents. Since the decision of the Court, neither of the parents has made any attempt to see the child, nor have they made any attempt toward providing proper care and maintenance for the child.

"The child is now in a prospective adoptive home, and has been for a period of over nine (9) months. The persons who have been keeping the child now desire to adopt it. (Under these circumstances, can an adoption be granted by the Court without the consent of the parents as contemplated by Exception No. 2 of Section 9609? If the answer to No. 1 is yes, then is it still necessary to notify the parents of the pendency

of the adoption proceedings?)"

Section 9609, Laws of 1947, page 214, in effect provides that in cases where minor children are sought to be adopted, the written consent of the parents shall be required, and reads in part as follows:

" * * * With the exceptions specifically enumerated in paragraphs numbered 1, 2, 3 set forth below in this section, when the person sought to be adopted is under the age of 21 years, the written consent of the parents, or surviving parent, of such person, or of the mother's alone of such person if such person was born out of wedlock, to the adoption shall be required and filed in and made a part of the files and record of the proceeding. * **"

Paragraph 2, makes an exception as to when the written consent of the parents shall not be required and reads as follows:

The consent shall not be required of a parent who has, for a period of at least one year immediately prior to the date of the filing of the petition for adoption, either willfully abandoned the person sought to be adopted, or willfully neglected to provide him with proper care and maintenance. If, in any such case, any public or private agency, organization or institution, whether within or without this state, has obtained the legal custody of the person sought to be adopted, the written consent of such agency, organization or institution to the adoption shall be required, except as hereinafter provided in Section 9610;"

It appears that the child referred to in your letter has been declared to be a delinquent or neglected child within the meaning of Section 9668, R.S. Mo. 1939, which section will not be quoted here because of its length.

It further appears that your court committed the custody of the minor child here in question to your county welfare organization for the reason that he believed the moral and physical well being of the child warranted such action, since the parents had apparently failed to properly care for the child in this respect. In committing the

child, the court was concerned with its present physical condition and there is no intimation that the arrangement was to be permanent, and certainly there is no intimation that the parents were to lose custody in an adoption proceeding, as no such proceeding was pending at that time. It appears that the contemplated adoption by the parties referred to was not thought of until over a year later.

This brings us to the questions asked in your letter, namely: "Under these circumstances, can an adoption be granted by the Court without the consent of the parents as contemplated by Exception No. 2 of Section 9609? If the answer to No. 1 is yes, then is it still necessary to notify the parents of the pendency of the adoption proceedings?"

As to whether or not parents have willfully abandoned the child within the meaning of paragraph 2, supra, brings up the question as to what actions on the part of the parents may constitute such abandonment.

Since the statutes do not define the term "abandonment," we look to the following Missouri cases for enlightenment. In the case of Watson's Adoption, 195 S.W. (2d) 331, 336, the court said:

"A willful abandonment then would seem to imply, first, a voluntary and intentional relinquishment of the custody of the child to another, with the intent to never again claim the rights of a parent or perform the duties of a parent; or second, an intentional withholding from the child, without just cause or excuse, by the parent, of his presence, his care, his love, and his protection, maintenance, and the opportunity for the display of filial affection."

Also in the case of Re: Perkins, 117 S.W. (2d) 686, it was held that to make a case of neglect which will dispense with the consent of the parent in an adoption case, it must be shown that the neglect was intentional, deliberate and without just cause or excuse. The court said:

* * * * * * * * * * * * *

"Adoption proceedings being statutory, there is always the question of how the statute shall be construed, with the answer usually depending upon the angle from which the subject is approached. It is of course true that the statute is to be liberally construed with a view to promoting the best interests of the child, but such liberal construction is

obviously not to be extended to the question of when the natural parents may be divested of their rights to the end that all legal relationship between them and their child shall cease and determine. * * * Consequently it is uniformly held as a simple matter of natural justice that adoption statutes are to be strictly construed in favor of the rights of natural parents, and that when controversy arises between natural parents and those who seek to destroy their parental status, every reasonable intendment is to be made in favor of the formers' claims. (1 Am. Jur., Adoption of Children, sec.9; 2 C.J.S., Adoption of Children, sec. (6)"

It appears that the parents of the child here in question were properly notified of the hearing before your juvenile court, and knew or should have known that the purpose of same was to deprive them of their child's custody and commit to the care of other persons because of the failure of the parents to properly perform their duties in this respect.

Whether the parents failed to appear and contest the action because of a feeling of inferiority, and fear of the court, (which illiterate persons and persons of low social standing are commonly known to possess) remorse of conscience, or indifference, does not appear, but at any rate they failed to appear.

Although it appears that your court wisely committed the child to the care of the proper authorities, who would see that its present physical and moral needs were taken care of, it does not follow that the parents were permanently precluded from later appearing before the court and requesting a reconsideration of the matter in order that they might be successful in regaining the legal custody of their child.

Neither were the rights of the parents forfeited in appearing and contesting any adoption proceeding that might subsequently be instituted, and in such case there could not be any adoption without the written consent of the parents, or unless the court found that they were not entitled to notice under the provisions of paragraph 2, Section 9609, supra.

In the case of Re:Schoenfeld, 171 S. W. (2d) 764, where a minor child born out of wedlock had been made a ward of the court as a neglected child, it was held that the court had jurisdiction to decree the adoption with the consent of the mother. The court also cited the following case with approval State v. Schlib, 285 S. W. 748.

From an examination of above and other similar cases in point, it appears that in adoption cases courts are inclined to require persons seeking adoption of minor children to a strict compliance of the adoption laws, and that they are reluctant to permanently sever the relationship of parent and child, even where it appears that the parent may have been negligent in his duties toward his child. Every reasonable intendment will be decided in favor of the natural parent's right to the care and custody of his child. Only after the most clear and convincing evidence of the willful, intentional and deliberate abandonment of the child or willful neglect to provide the proper maintenance, are the courts inclined to allow the adoption of such a neglected child. In such cases the written consent of the parents to the adoption is required, except where the court is satisfied that the facts justify the dispensing with such consent under the provisions of paragraph 2, Section 9609, supra.

Whether or not there has been an abandonment by the parent sufficient to bring the case under the provisions of the exception in paragraph 2, of above mentioned section is a matter of fact to be decided by the court before whom the adoption proceeding is pending.

Regarding the case before us, we are not in a position to state whether or not the written consent of the parent to the adoption of their child may be dispensed with as that is a question of fact to be decided by your judge. Unless other facts are involved than those given in your letter, it does not appear that the consent could legally be dispensed with, and that in such adoption proceeding, the written consent of the parents must be had, and notice in any event in the manner and form provided by Section 9610 must be served upon the parents.

CONCLUSION

It is therefore the opinion of this department that where a minor child has been declared to be delinquent and neglected under the provisions of Section 9698, R.S. Mo. 1939, and has become a ward of the court, said court has ordered the child committed to the custody of a county welfare organization, and where it further appears that the question of the willful and intentional neglect, or abandonment of the child by its parents has been raised in connection with a subsequent adoption proceeding of the child before said court, such question of neglect or abandonment is one of fact to be decided by the court. It is also a question of fact to be decided by the court whether the abandonment or neglect has continued for a period of at least twelve months immediately prior to the filing of the adoption petition.

It is the further opinion of this department that the written consent of the parents to the adoption of their child must be had, and in any event proper written notice of the proceeding must be served upon them as provided by Section 9610, Laws of 1947, and if the court is satisfied from the most clear and convincing evidence that the parents have willfully and intentionally neglected or abandoned it without just cause, no written consent of the parents shall be required under the provisions of the exception stated in paragraph 2, Section 9609, Laws of 1947

Respectfully submitted,

PAUL N. CHITWOOD Assistant Attorney General

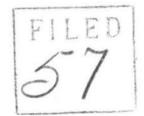
APPROVED:

J. E. TAYLOR ATTORNEY GENERAL E JDINGS
ALTROPRIATIONS

) No specified number of houses for physicians required under the provisions of appropriations) set out on pages 107 and 189, Laws of Mo. 1947, Vol. II.

April 11, 1949

1,19



Mr. Samuel Marsh, Director Department of Public Health and Welfare State Office Building Jefferson City, Missouri

Dear Mr. Marsh:

This is in reply to your request for an opinion from this Department which reads as follows:

"The Sixty-fourth General Assembly, in the first session, appropriated the sum of \$78,000 'for constructing and furnishing six houses for physicians'. Laws of Missouri 1947, Volume I, Section 3, page 171, lines 4 and 5.

"The Sixty-fourth General Assembly in the second session, reappropriated the same \$78,000 fund, as no part of the first appropriation had been encumbered or expended because we were advised by competent architects and contractors that we could not build desirable houses under conditions existing in the construction field at the time the appropriation was originally made.

"In the Act re-appropriating this \$78,000 fund the word 'six' was omitted from the sentence 'for constructing and furnishing six houses for physicians', so that the wording in the Act which re-appropriated the money reads 'For constructing and furnishing houses for physicians'. Laws of Missouri 1947, Volume II, Section 5.111, page 107 lines 7 and 8.

"Also in the second session of the Sixty-fourth General Assembly another Act was passed supplementing this fund of \$78,000 by appropriating an additional \$42,000, and the wording used in this Act was the same as in the last Act re-appropriating the \$78,000 fund, namely: 'For constructing and furnishing houses for physicians'. Laws of Missouri 1947, (Volume II) Section 9.230, page 189, lines 3 and 4.

"On March 23, 1949, we opened bids for the construction of these houses. We advertised the project in such a manner that we received bids from the contractors for either 4, 5, or 6 houses. For the total of six houses the lowest bid was above the amount of the combined appropriation of \$120,000. However, the appropriation would cover the lowest bid for only four houses.

"We would like your opinion as to whether, if we deem it to the best interest of the State to build only four houses, we can lawfully let a contract for the construction of less than six houses."

(Parenthesis ours.)

In your request you have set out the sections of the appropriation acts with which we are concerned. It should be noted, however, that the General Assembly provided in Laws of Missouri 1947, Vol. II, page 107, as follows:

"Provided, however, that all expenditures made under the provisions of Section 3 of House Bill No. 283, an Act of the 64th General Assembly, approved July 25, 1947, shall be charged against the appropriation set out in this section, and in no case shall the expenditures in Section 3 of House Bill No. 283 and the expenditures authorized under the provisions of this section exceed the total amount of the items set out in this section."

We understand the above quoted proviso to indicate an intent of the legislature that the total amount of money to be expended in the construction and furnishing of houses for physicians at State Hospital Number 1 to be in the amount of \$78,000. As you point out in your request this amount of \$78,000 was later supplemented by an additional \$42,000, for the same purpose.

The authority for an expenditure of money to provide living quarters for physicians at the State Hospital is to be found in Laws of Missouri 1947, Vol. I, page 315, Section 10d., which reads as follows:

"The department of public health and welfare may provide any employee in any institution under its control with board and living quarters in addition to a salary, or wages, when the director shall determine that it is for the best interests of the state to do so."

Appropriations made by the General Assembly follow a provision of the law which provided for a Department of Revenue. In Laws of Missouri 1945, page 1447, Section 55 reads in part as follows:

" * * * Appropriations for the operation and maintenance of departments shall be separately itemized; and separate appropriations shall be made for each item of extraordinary operation and maintenance expenditure and for each major capital expenditure. * * * * *"

The original appropriation in question was in the amount of \$78,000 for the construction and furnishing of six houses. Broken down it is seen that this amounted to an average of \$13,000 a house. Before this fund was used, the period of time for which the appropriation was available elapsed. Thereupon, the General Assembly reappropriated the same amount of money making it available to the department for the above stated purpose. Because of the conditions existing in the construction field at that time, the appropriation was deemed insufficient for construction and furnishing of the desired number of residences. Therefore, an additional amount of \$120,000 was added by supplementary appropriation, making a total of \$120,000.

However, in both the reappropriation Act and the supplementary appropriation thereto, the General Assembly omitted the word "six" which previously modified the word "houses". From a mere reading of the appropriation acts, there is nothing to indicate that the General Assembly intended that an effort should still be made to build and furnish six houses at State Hospital No. 1. Since there is no such expressed intention, we believe that it has been left to the sound discretion of the administrators of this fund to determine the cost of the houses.

We note that the General Assembly appropriated for the F. Y. of July 1, 1947 to June 30, 1948, a sum in the amount of \$403,000 for the construction and furnishing of houses for physicians. The legislature renewed this appropriation for the F. Y. July 1, 1948, to June 30, 1949. Later, this amount was supplemented by appropriations totalling \$317,000, making a grand total of \$720,000 available to the Department of Public Health and Welfare for the construction and furnishing of houses for physicians.

Out of the above named total appropriation, contracts have been let for the construction of six houses at State Hospital No. 4, Farmington, Missouri. The appropriation for these houses is in the

same form as that provided for the houses at Fulton (See Laws of Mo. 1947, Vol. 2, pages 113 and 193). The total amount of the contract sum for the six houses at Fulton is \$107,281.64, thereby making an average cost of the houses approximately \$17,880.00.

One house has been built at State Hospital No. 3, Nevada, provided for by an appropriation in the same form as the appropriation for Fulton. (See Laws of Mo. 1947, Vol. 2, pages 111-191.) The contract price for the one house at Nevada was \$15,700.00.

The low bidder for the construction of six houses at Fulton entered a base bid of \$139,984.00. By deducting alternates in the contract, namely houses E and F, the base bid was lowered to \$103,-713.00, for the construction of four houses, making an average of approximately \$26,000.00 per house. However, House A as provided for by the drawings and the specifications is larger and necessitates more work thereby reducing the average cost of three of the houses and increasing the cost of House A considerably.

From the facts above, it is seen that there has been appropriated a large sum of money to be used for construction of living quarters for physicians, at the state institutions. In making the appropriations, the legislature, whether by inadvertence or otherwise, omitted any indication as to the number of houses to be built. We have seen that the first expenditure from these appropriations at Farmington will result in the construction of six houses, as contemplated in the original bill. (See Laws of Mo. 1947, Vol. 1, page 173.) Also, we have seen that one house has been built at Nevada for \$15,700.00, which is in conformity with the original intent of the legislature. (See Laws of Mo. 1947, Vol. 1, page 172) Nonetheless under the present appropriation acts the legislature has apparently left to the administrators of these funds discretion as to the costs of the houses for the physicians at these institutions.

We are unable to see any legal objection for the expenditure of this appropriation on only four houses instead of six. In so ruling, we must necessarily consider only the legal problem involved, and we do not in any way rule on the wisdom of such a course.

CONCLUSION.

Therefore, it is the opinion of this department that there is no requirement that six houses for physicians must be constructed and furnished from the appropriation provided by the General Assembly

in Laws of Missouri 1947, Volume II, pages 107 and 189. If the persons charged with the expenditure of these sums deem it is to the best interest of the state to build only four houses, such a contract may lawfully be let.

Respectfully submitted,

APPROVED:

JOHN R. BATY Assistant Attorney General

J. E. TAYLOR Attorney General

JRB/few

GREAT SEAL OF THE STATE OF MISSOURI:

PROCUREMENT: DEVICE:

Secretary of State authorized to procure a new great seal; but no choice of device to be engraved on same, as device is not subject to change, but must comply strictly with Section 15437, R. S. Mo. 1939.

May 20, 1949

Mr. J. Paul Markway
Chief Clerk
Office of Secretary of State
Jefferson City, Missouri

FILED 57

Dear Sir:

This will acknowledge receipt of your letter in which you request an opinion of this department based on the following facts:

"This office is contemplating having a new 'Great Seal of the State of Missouri' made. In this connection we have checked the seals now in use.

"Section 15437, R.S. Mo; 1939 describes the 'Great Seal of the State of Missouri'. We quote from this section, '. . . . For the crest, over a helmet full-faced, grated with six bars; or, a cloud proper, from which ascends a star argent, and above it a constellation of twenty-three smaller stars. . . . '

"Attached hereto, marked 'exhibit l' is an imprint made from the seal now in use in our Commission department. This is the one used on all the official documents signed by the Governor. As you will notice, the twenty-three small stars above the helmet are very plain. The large star is either not there, or it has been worn so it no longer is discernible on the imprint.

"'Exhibit 2', also attached, shows the 23 small stars but no large star. This is the seal which has geen used in our Corporation department.

"It appears obvious to us, therefore, that a new seal is needed.

"The photograph which we are sending you with this letter is an enlarged reproduction of what we consider to be the original 'Great Seal'. This original seal is in our keeping. Letters of transmittal in our files indicate that this is the one taken from this State during the Civil War and returned to Governor McClurg in 1869. It seems to us that this is the most authentic.

"As you will notice, there are some differences in the design of the original and the one now in use. For instance, the bears are facing somewhat differently, and the decorations extending to the right and left of the helmet are of different designs. The design of the original, however, seems to come closer to the design shown on page 3906 of Volume II of the Revised Statutes of Missouri, 1939.

"We respectfully request your opinion as to whether or not we have the authority to have a new seal made. If so, we would also like your opinion as to whether or not we have any choice between the various designs formerly used."

The origin of the great seal is so very closely connected with the early history of Missouri and the pioneers who fisrt inhabited the state that it is cifficult to write an opinion of this nature without also writing something of the early citizens of Missouri. However, we shall confine our remarks as closely as possible to a discussion of the answers to the questions referred to in the request for an opinion and shall not refer to Missouri's first citizens except as necessity may require.

It appears that the most important and long-standing use of a seal by a government is as a symbol of sovereignity and that as such seals are generally in use among all civilized countries or states. The framers of our first constitution in 1820, found it necessary to make provision for a great seal of Missouri to symbolize the supreme authority of the new state. Article IV, Section 22, Constitution of 1820, provides for the great seal and designates the secretary of state custodian of said seal, and reads as follows:

"The secretary of state shall, as soon as may be, procure a seal of state, with such emblems and devices as shall be directed by law, which shall not be subject to change. It shall be called the 'Great seal of the state of Missouri;' shall be kept by the secretary of state, and all official acts of the governor, his approbation of the laws excepted, shall be thereby authenticated."

By an act of the legislature which became effective January 22, 1822, the device of the great seal was set out in detail. Section 2, of the act made it the duty of the secretary of state to procure a great seal at public expense. Said section reads as follows:

"Be it enacted by the General Assembly of the state of Missouri, That the device for an armorial achievement for the state of Missouri, shall be as follows, to wit: Arms, parted per pale, on the dexter side gules, the white or grisly bear of Missouri, passant guardant, proper: on a chief engrailed azure, a crescent argent; on the sinister side argent, the arms of the United States; the whole within a band inscribed with the words 'UNITED WE STAND, DIVIDED WE FALL.' For the crest, over a helmet full faced, grated with six bars, or, a cloud proper, from which ascends a star argent, and above it a constellation of twentythree smaller stars argent on an azure field, surrounded by a cloud proper. Supporters on each side, a white or grisly bear of Missouri, rampant, guardant proper. standing on a scroll, inscribed with the motto, 'Salus populi Suprema lex esto,' and under the scroll the numerical letters MDCCCXX. And the great seal of this state shall be so engraved as to present by its impression, the device of the armorial achievement aforesaid, surrounded by a scroll inscribed with the words 'THE GREAT SEAL OF THE STATE OF MISSOURI' in Roman capitals, which seal shall be in a circular form and not more than two and a half inches in diameter.

"Sec. 2. Be it further enacted, That the secretary of state shall procure the said seal, engraved as prescribed by this act, and he is hereby authorized to draw on the auditor of public accounts for all expenses accruing in procuring such seal, to be paid by the treasurer of this state out of any moneys in the treasury. This act shall be in force from and after the passage thereof."

Complying with the act as passed by the first general assembly, William G. Pettis, then Secretary of State, carried into effect the statute describing the coat of arms by having engraved, "The Great Seal of the State of Missouri." Since it was optional with him under the act, he selected the grizzly bear as in his opinion such bear most positively represented the rugger character of the inhabitants of the new State of Missouri.

While it is not known for certain who may have suggested the arms of Missouri, it is generally believes that Circuit Judge Nathaniel Beverly Tucker is the person responsible for the design as he was one of the most accomplished and public spirited leaders of his day.

He was a very ardent supporter of states rights and it appears that this idea seems to pervade the design of the great seal.

The meaning of the arms of the state is not now generally understood, and since it has a very profound significance, expressing the situation of the new state in very appropriate and heraldic language, we feel that a brief explanation of same is proper in this opinion.

We therefore quote from Houck's History of Missouri, page 270, as follows:

"The arms of the state of Missouri and of the United States empaled together, yet separated by a pale, denote the connection existing between the two governments, and show that, although connected by a compact, yet we are independent as to internal concerns; the words surrounding the shield denote the necessity of the Union. Quadrupeds are the most honorable bearing. The great grizzly bear being almost peculiar to the Missouri river and its tributaries, and remarkable for his prodigious size, strength, and courage, is borne as the principal charge of our shield. The color of the shield is red and denotes hardiness and valor. The chief is most honorable of all ordinaries. color blue signifies vigilance, perseverance, and justice. The crescent, in heraldry is borne on the shielf by the second son, and on our shield denotes that we are the second state (Louisiana being the first) formed out of territory not within the original territorial limits of the United States and admitted into the Union. The crescent also denotes the growing situation of this state as to its inhabitants, wealth, power, etc. The color white signifies purity and innocence. The hemlet indicates enterprise and hardihood.

The one blazoned on this coat of arms is that assigned to sovereigns only. The star ascending from a cloud to join the constellation shows
Missouri surmounting her difficulties and taking her rank among the other states of the Union.
The supporters, the same powerful animals, borne on the shield, which support the shield, on which are emblazoned the arms of the state and of the United States, denote, that while we support ourselves by our own internal strength we are also in support of the general government. The motto shows that the good of the people is the supreme law of this state. The numerals under the scroll show the date of the constitution."

From the enlarged photograph of the great seal enclosed in your letter, it appears that the subject is the seal taken from the capitol on June 12, 1861, by Governor C. F. Jackson, and later returned by Thomas C. Reynolds to Governor McClurg on May 12, 1869. (Annotation (a) Section 8144, R.S. Mo. 1889).

It appears that the laws relating to the great seal and to the duties of the secretary of state as custodian of same have not undergone any change from the beginning, with one notable exception.

Section 2, Laws of Mo. 1822, supra, provided that the secretary of state should procure a great seal engraved as provided by the act, the expense of which was to be borne by the state. This section is found in the revised statutes of Missouri continuously until May 14, 1909. On that date, Section 10017, R.S. Mo. 1899, relating to the authority of the secretary of state to procure a seal was repealed by the legislature. From the date the repeal became effective the secretary of state has not had the specific statutory authority to procure a great seal. However, for reasons hereinafter given, we are of the opinion that this important duty enjoined on the secretary of state was not lost by the repeal of the section mentioned.

As already noted in the constitutional and statutory provisions, particularly Section 12995, Laws of Mo. 1945, the secretary of state is still the custodian of the great seal, and among other duties he is still required to affix the seal to certain documents, as set out in Section 12996, Laws of Mo. 1945, which sections read as follows:

"Section 12995. Safe-keeping of state seal and all public records--register of all commissions and official acts of the governor.-He shall keep his office at the seat of the government; have the safe-keeping of the seal of state, and of all public records, including surety bonds except of secretary of state, rolls, documents, acts, resolutions and orders of the general assembly; keep a register of all commissions issued, the official acts of the governor, and, when necessary, attest the same."

"Section 12996. Affix seal to all commissions and official acts of the governor-exception.-He shall affix the seal of the state to and countersign all commissions and other official acts required by law to be issued or done by the governor, his approbation or disapprobation of the acts of the general assembly excepted, and all other instruments, when required or authorized by the governor, or by law."

It is obvious that under certain circumstances it would be impossible for him to perform the duties mentioned in the preceding sections if it is assumed that he no longer has any authority to procure a great seal.

For example if the great seal should become damaged, worn-out, destroyed by fire, or for other causes could no longer be used as a great seal, the secretary of state would have no authority to procure another one, and of course he could not affix the seal to certain documents as required by law, such a contingency would finally result in depriving Missouri of its great seal.

It is not known what idea the legislature may have had in ming when it repealed that part of the statute back in 1909, authorizing the secretary of state to procure a seal, since there is no record of any discussion on the subject in the journals of either house of the legislature, but we believe it was not the intention of the legislature to repeal any sections of the statute defining the duties of the secretary of state regarding the great seal, as no further action in this respect was over taken.

It appears that if the legislature had meant for the secretary of state never again under any circumstances to procure a new seal it would have so stated in very clear and unmistakable language.

To assume that the Secretary of State no longer has any authority to procure another seal would be to place him in the ridiculous psotion of being required to perform a duty (in this instance to affix the great seal to certain documents) and at the same time to

forbid him to procure the necessary equipment with which to perform that duty. We are of the opinion that the legislature had no intention of placing the secretary of state in any such embarrassing position.

Section 13006, Laws of 1945, regarding the expenses incidental to the performance of duties of the secretary of state, provides as follows:

"All expenses connected with the performance of duties assigned to the secretary of state shall be governed by the general laws with respect to contracting obligations, certifying of accounts and other matters pertaining thereto."

Since this section of the statute begins with these words, "All expenses connected with the performance of duties assigned to the secretary of state * * *," we are of the opinion that the word "all" would include every expense of any nature that was connected with the performance of any duty that had been assigned to the secretary of state.

We are of the further opinion that the expense of procuring a new seal would come within this provision of the statute, and that such statute would be sufficient authority for the secretary of state to procure a new seal as circumstances might require.

The act of the legislature of 1822, supra, clearly described the device of the great seal in detail, and it is further noted in this connection that the device was not subject to change. The above mentioned legislative act has been a part of our statutes since its passage and is now designated as Section 15437, R. S. Mo. 1939.

In procuring a new great seal of Missouri in view of the fore-going constitutional and statutory provisions we are of the opinion that the secretary of state has no choice as to the various devices formerly in use. From the various samples of such devices submitted to us it appears that the enclosed enlarged photograph of the great seal most nearly meets the description set out in Section 15437, R.S. Mo. 1939, although the name of the engraver appearing near the lowerpart of the seal is not authorized by the constitution or any statutory provisions. In the procurement of a new seal the secretary of state should ascertain that such seal exactly meets the description of the device set out inSection 15437, supra, and that no words, figures, signs or symbols or characters of any nature whatsoever should appear thereon unless authorized by said section.

CONCLUSION

It is therefore the opinion of this department that the secretary of state by virtue of above quoted constitutional and statutory provisions has authority to procure a new great seal of Missouri, at public expense, as necessity for same may require, and in order that such officer may be enabled to fully perform the duties enjoined on him by law as to the affixing of said great seal to certain documents.

It is the further opinion of this department that in procuring a new great seal of Missouri, the secretary of state has no choice as to the various designs formerly used to be engraved on said seal. Section 15437, R.S. Mo. 1939, clearly describes the device of said seal, which device is not subject to change. We are of the opinion that any deviations therefrom is without authority of law and that the engraver should follow the description of the device of the greal seal in said section as closely in every detail as it is possible for him to do.

Respectfully submitted,

PAUL N. CHITWOOD Assistant Attorney General

APPROVED:

J. E. TAYLOR Attorney General TAXATION:
COUNTY COURTS:
ELECTIONS:
ROADS AND BRIDGES:

When tax is voted by the people under provisions of Sections 8529, 8530 and 8531, Laws of Missouri, 1945, page 1478, county court has no discretion as to whether or not levy shall be made, and no election may be held to nullify such tax.

June 27, 1949

Honorable W. V. Mayse Prosecuting Attorney Harrison County Bethany, Missouri



Dear Sir:

This is in answer to your letter of recent date requesting an official opinion of this department reading as follows:

"I would like an opinion from your office on the following situation:

"A township of our county voted a special levy and it now develops that they cannot use the levy for this reason. They have to issue protested warrants, and in view of the pending legislature to abolish township organizations, the banks nor any other investors in our county will buy township protested warrants.

"Apparently the people in the township now desire that this special levy not be run on the books because they cannot use them, and they have requested the county court not to run this levy on the books. My questions are:

- "(1) Can the court just simply fail to run this levy on the books?
- "(2) Can the people in the township hold another special election to do away with this levy?"

In a subsequent letter you state that the levy about which you write was voted by the people under the provisions of Section 8529, 8530 and 8531, Laws of Missouri, 1945, page 1478. Such sections refer to the voting of an additional tax by the qualified voters of a "general road district." We assume, therefore, that the township about which you speak is

Hon. W. V. Mayse

in reality a "general road district" and had authority to vote such additional taxes. We are enclosing an official opinion of this department rendered under date of March 24, 1947, to Honorable Herbert S. Brown, Prosecuting Attorney of Grundy County, holding that the tax authorized by Sections 8529 to 8531, inclusive, Laws of Missouri, 1945, page 1478, must be voted each year in order to be levied.

The fact that some of the people in the township now desire that the special levy not be run can in no way affect any duty that the county court must have with regard to any taxes. It is the duty of the county court to comply with the law and to perform all duties placed upon it. The fact that an authorized election was held imposing the tax makes it the duty of the county court to comply with the law in all respects insofar as this levy is concerned. It is the universally accepted principle that no election can be held unless provided for by law. State ex rel. vs. Ellison, 271 Mo. 123. We find no authority for the calling of an election to do away with the levy which was coted in the general road district. Therefore, we are of the opinion that no such election can be held.

CONCLUSION

It is the opinion of this department that it is the duty of the county court to comply fully with the law after a majority of the qualified voters of a general road district have voted a tax levy under the provisions of Sections 8529 to 8531, inclusive, Laws of Missouri, 1945, page 1478. It is further the opinion of this department that no authority exists for holding an election to do away with a levy so voted.

Respectfully submitted,

C. B. BURNS, JR. Assistant Attorney General

APPROVED:

J. E. TAYLOR Attorney General

CBB: VLM

ELEEMOSYNARY INSTITUTIONS: HOSPITALS (County & City): INSANE PERSONS:

JTIONS: (1) Counties and cities qualify for City): State aid for care of insane persons when they maintain wards or sections in hospitals caring for other types of patients. (2) Payments not limited to persons adjudged insane by a court.

(3) Payments may be made only for the care, detention or treatment of indigent insane persons. (4) The claim August 17, 1949 for Kansas City may not be

paid out of the appropriation as passed by the 64th General

Hon. Samuel Marsh
Director, Department of
Public Health and Welfare
Jefferson City, Missouri



8/30/49

Assembly.

Dear Mr. Marsh:

This is in reply to your request for an opinion which reads as follows:

"Sections 9360, 9361 and 9362 of Laws of Missouri 1947, Volume I, Page 291, provide for payments of \$8.00 per month from State funds to be made to any county or city in the State for the care of insane patients, if such county or city maintains from public funds a hospital for the care, detention or treatment of the insane.

"These provisions in the law place upon the Director of the Department of Public Health and Welfare certain responsibilities to examine by proper medical authorities any institutions presenting claims against the State for such payments, and to certify the claims to the Director of the Department of Revenue, who shall cause such payments to be made.

"The last appropriation of money for this purpose was made by the Sixty-fourth General Assembly. This appropriation is set forth in Laws of Missouri 1947, Volume I, page 114, Section 5.160, and we have several claims pending at the present time for funds to be paid from this appropriation. These claims are from the City of St. Louis, and are based on the patients cared for in the following institutions:

City Sanitarium, prior to July 19, 1948, Malcolm Bliss Psychopathic Hospital, Homer G. Phillips Hospital, City Infirmary.

"We have also received a notice that the City of Kansas City will soon present a claim for the first time against this fund for insane patients cared for in the General Hospital there.

"Inasmuch as there is considerable question in our mind as to whether the intent of the law was to cover only patients cared for in a mental hospital, such as the City Sanitarium in St. Louis, which has been operated as a State institution since July 19, 1948, or whether the intent was to provide payments from State funds for patients cared for in other city institutions as well, we would like your interpretation of these provisions in the law.

"First, we would like to know whether we can make these payments to any institution maintained by a county or city that cares for insane patients along with other types of patients, or whether we are limited to payments to counties or cities that maintain hospitals exclusively for insane patients.

"Second, we would like to know whether we are limited in making these payments for the care of patients who have been adjudged by the courts to be insane, or whether we are free to set up our own standards to define 'insane patients.'

"Third, are we limited to making payments only to indigent insane persons?

"Fourth, in the event the answer to the first question is 'Yes,' may the City of Kansas City receive any of the moneys appropriated for the purpose of state aid to mental hospitals established and maintained by counties or cities?"

Section 9360, R. S. Mo. 1939, Laws of Missouri, 1947, Volume I, page 291, is as follows:

"Any county or city in this state which shall maintain from public funds a hospital for the care, detention or treatment of the insane, which hospital is properly equipped as to facilities, staff and personnel, shall be entitled to \$8 per month per patient, upon proper report filed and sworn to by the superintendent of such hospital for the insane, when such report is filed with the state department of public health and welfare. Such reports shall be filed quarterly and shall show name, address and other necessary data so as to properly identify and authenticate the patients of such insane institution."

Section 9361, R. S. Mo. 1939, Laws of Missouri, 1947, Volume I, page 291, is as follows:

"The department of public health and welfare shall have authority to examine by proper medical authorities any and all such institutions for the insane, so as to determine if said hospital is efficiently equipped and if said list as filed by the superintendent is correct and authentic and shall have power to make suggestions where conditions are found which need correction or improvement."

Section 9362, R. S. Mo. 1939, Laws of Missouri, 1947, Volume I, page 291, is as follows:

"Upon receipt and approval of the sworn statement of the superintendent of such hospitals for the insane, the director of the department of public health and welfare shall certify such approval to the director of the department of revenue who shall cause to be paid, in the same manner other payments are made, to the county treasurer or city treasurer of any county or city containing such hospital for the insane, the sum of \$8 per month per patient out of the general revenue funds of the state or any other funds which may be provided or set aside for this purpose."

These sections were originally enacted by the 56th General Assembly in 1931, and are found in Laws of Missouri, 1931, page 221. At that same session, Section 9345, R. S. Mo. 1939, was also enacted in which a method was prescribed for commitment of indigent insane persons in the City of St. Louis. Section 9345 was re-enacted by Laws of Missouri, 1945, page 905. The changes that have been made in that section have been merely technical changes and the substance of the law has not been changed since the original enactment in 1931. In brief, the law provided that the hospital commissioner of the City of St. Louis could make supplemental orders authorizing the commitment of insane persons to the City Sanitarium of the City of St. Louis or any other institution maintained by said city for the care of the indigent insane.

The payment of the money appropriated pursuant to Sections 9360-9362 is under question since the transfer of the St. Louis City Sanitarium from control of the city to the Department of Public Health and Welfare. In the past large sums of money have been appropriated in order to carry out the provisions of the aid program. For example, for the fiscal year beginning July 1, 1945 and ending June 30, 1946, the sum of \$267,500.00 was appropriated for this purpose; for the fiscal year beginning July 1, 1947 and ending June 30, 1948, the sum of \$300,000.00 was appropriated for this purpose. On July 19, 1948, the City Sanitarium was transferred to the State of Missouri, and undoubtedly as a result thereof the Legislature limited the appropriation for the aid program to \$50,000.00 for the fiscal year July 1, 1948 to June 30, 1949.

However, under the view that we take of Section 9360, supra, we do not believe that the transfer of the City Sanitarium has resulted in making inoperative this aid section. If any county or city in the state maintains from public funds a hospital for the care, detention or treatment of the insane and the hospital is properly equipped as to facilities, staff and personnel, we believe that the said county or city would be entitled to \$8.00 per month per patient upon filing the proper reports which are approved by the Director of the Department of Public Health and Welfare.

Your first question is really concerned with whether or not compliance is had when a county or city maintains a hospital for the care, detention or treatment of the insane along with other types of patients. In the case of New York Life Ins. Co. v. Ince, 27 S.W. (2d) 476, the St. Louis Court of Appeals was considering a case in which one point in question was whether or not a "clinic" was a "hospital, asylum or sanitarium." In its opinion the court said, l.c. 480:

"In response to question 7-B as to whether the applicant had been under observation or treatment in any hospital, asylum, or sanitarium, he answered in the negative. It appears, however, that he had been under observation at the Mayo Clinic at Rochester, Minn., on two occasions, once in 1914 and again in 1919.

"Defendants contend that the answer to this question is correct because the Mayo Clinic is not a hospital, asylum, or sanitarium, and that therefore his negative answer to the question was true. Counsel say that since the insurer framed the question it must be assumed that if it deemed it important to know whether one had been to a 'clinic' it would have included that word in its question. Technically speaking, a 'clinic' is not an hospital, asylum, or sanitarium, in the sense, at least, that it does not provide beds for its patients, yet a clinic is usually, if not always, an adjunct of a hospital or medical college, and when connected with a hospital is as much a part thereof as all other departments of the institution devoted to the observation or treatment of ills. The defendants introduced evidence to the effect that the Mayo Clinic is separate and distinct from their hospital; that their clinic is just a large clinical building they put their patients through before sending them to the hospital; that is . where they make their examination. It seems to follow that while the clinic is used for the examination of patients before placing them in the hospital, it is yet a part of the hospital. * * *

So, in the present instance, the hospitals in question have wards and operate departments for the care, detention and treatment of the insane. We believe that following the principle evolved in the Ince case, supra, the maintenance of these wards would be sufficient to qualify these hospitals for the aid provided for in Section 9360, supra. We do not think it would be necessary, nor in most cases practical, that counties or cities desiring to qualify under Section 9360 should be required to set up separate hospital buildings for the care, detention or treatment of the insane. Of course, Section 9361, quoted supra, gives

the Department of Public Health and Welfare the authority to determine if the sections of said hospitals are efficiently equipped for the purpose of the care, detention or treatment of the insane.

Your second question is as follows:

"Second, we would like to know whether we are limited in making these payments for the care of patients who have been adjudged by the courts to be insane, or whether we are free to set up our own standards to define 'insane patients.'"

Section 9358, R. S. Mo. 1939, defines the term, "insane," as follows:

"The words, 'insane' and 'lunatic,' as used in this chapter, shall be construed as including every species of insanity or mental derangement. * * *"

With this definition in mind, and in view of the authority of the Director of the Department of Public Health and Welfare to determine the correctness and authenticity of the list filed by the superintendent, we believe that the Director is authorized to determine for himself whether or not the patients allegedly insane are in fact insane so as to enable the county or city to qualify for said aid. Of course, if a person has been adjudged insane by a court, we do not think that the Director would be authorized to question such a finding.

Your third question is as follows:

"Third, are we limited to making payments only to indigent insane persons?"

Although Section 9360, supra, does not limit payments to indigent persons, we note that the Legislature in making the appropriation for the fiscal year in question has so limited the payments. Section 5.160, Laws of Missouri, 1947, Volume II, page 115, reads as follows:

"There is hereby appropriated out of the State Treasury, chargeable to the General Revenue Fund, the sum of Fifty Thousand Dollars (\$50,000.00) or so much thereof as may be necessary for the purpose of paying the mental hospitals, established and

maintained by any county or city not within a county in this state, the sum of Eight Dollars (\$8.00) per month, for each indigent insane person, detained and treated in such hospital, pursuant to the provisions of Section 9360, Revised Statutes of Missouri, 1939; for the period beginning July 1, 1948 and ending June 30, 1949." (Underscoring ours.)

The term "indigent insane" has been defined by the Legislature in Section 9358, R. S. Mo. 1939, as follows:

" * * * The terms 'insane poor' or 'indigent insane, when applied to a person without a family, shall mean one whose property of all kinds does not exceed, after payment of his debts and liabilities, that which is exempted by the laws of this state from attachment and execution when owned by any person other than the head of a family; and the same words, when applied to a person having a family, shall mean one whose property of all kinds does not exceed, after payment of his debts and liabilities, that which is exempted by the laws of this state from attachment and execution when owned by the head of a family: Provided, that when the said words are applied to a married woman, her separate estate, if any, and that of her husband shall be estimated as aforesaid, and the total amount of both estates shall determine the question aforesaid. whether she be a 'poor' person or not, within the meaning of this chapter. * * *"

Therefore, because the Legislature has only appropriated money for aid in the cases of indigent insane persons, the Department of Public Health and Welfare is limited to making payments only for the care, detention or treatment of such persons.

Your fourth question is as follows:

"Fourth, in the event the answer to the first question is 'Yes,' may the City of Kansas City receive any of the moneys appropriated for the purpose of state aid to mental hospitals established and maintained by counties or cities?"

We note in your request that Kansas City is planning to submit a claim for the first time against this fund for insane patients cared for in the General Hospital there. In the first appropriation made pursuant to what is now Section 9360, R. S. Mo. 1939, the Legislature limited payments to "mental hospitals, established and maintained by any county or city not within a county in this state." (Section 46c, Laws of Missouri, 1933, page 88.) The 64th General Assembly also limited payment to "mental hospitals, established and maintained by any county or city not within a county in this state." (Section 5.160, Laws of Missouri, 1947, Vol. II, page 115.) In view of this limitation in the appropriation act, it is obvious that the only city which is qualified to receive money, under Section 9360, is the City of St. Louis, since it is the only city not within a county in this state. Therefore, even though the claim for Kansas City may be a valid one, it may not be paid out of the appropriation as passed by the 64th General Assembly.

Conclusion.

Therefore, it is the opinion of this department that:

- 1. Counties or cities maintaining wards or departments in hospitals may qualify for aid from the state for the care, detention or treatment of the insane when found by the Director of the Department of Public Health and Welfare to be efficiently equipped for the purpose.
- 2. Payments are not limited to those adjudged insane by a court, but may also be made for the care, detention or treatment of those persons determined by the Director to be insane.
- 3. Payments out of the appropriation as passed by the 64th General Assembly may be made only for the care, detention or treatment of indigent insane persons.
- 4. The claim for Kansas City may not be paid out of the appropriation as passed by the 64th General Assembly, because said appropriation limits payments to any county or city not within a county, and Kansas City does not fall within such classification.

Respectfully submitted,

APPROVED:

JOHN R. BATY Assistant Attorney General

J. E. TAYLOR Attorney General TY COURT) Section 10932, R.S.A., relating to advertising for bids inapplicable to third and fourth class counties.

August 17th, 1949

9/3/49

FILED 57

Honorable W. D. Mayse Prosecuting Attorney Harrison County Bethany, Missouri

Dear Sir:

Your letter at hand requesting an opinion of this office which in part reads:

- "(1) In a county such as ours, with less than 50,000 population, may the County Clerk purchase election supplies if the cost thereof is over \$500.00, without advertising for the lowest and best bid as would seem required from Sec. 10932, Revised Statutes of Missouri, 1939, which section is a part of the County Budget Law.
- "(2) If the expense of the election supplies for any one election is less than \$500.00, may the County Clerk purchase them without the approval of the County Court of such contract of purchase.

"As I understand Section 11593, Revised Statutes of Missouri, 1939, election supplies are a public expense and as such it would seem to me that their cost and purchase should be governed by our County Budget Law."

As you have pointed out in your first question, Section 10932, R. S. Missouri, 1939, repealed and reenacted by Laws of Missouri, 1945, page 603, is a part of Chapter 73, Article 2, styled the County Budget Law, and containing Sections 10910-10935, inclusive. Section 10910, R.S.A., Laws of Missouri, 1945, page 610, in part

provides:

" * * * All counties of the third and fourth classes shall be governed by Sections 10910 to 10917, inclusive, of this article. * * *"

Harrison County is a county of the third class. Consequently, Section 10932, supra, relating to advertising for bids on contracts or purchases involving an expenditure of \$500.00 or more is not applicable to this class of county. This section would only apply to larger classes of counties.

The cost of elections, which would necessarily include election supplies required to conduct elections, such as ballots, cards of instruction and other supplies, must be budgeted as required by our County Budget Law. Thus, Section 10911, R. S. Missouri, 1939, providing for the classification of proposed expenditures in part reads:

"The court shall classify proposed expenditures in the following order:

* * *

"Class 2. Next the county court shall set aside a sum sufficient to pay the cost of elections and the cost of holding circuit court in the county where such expense is made chargeable by law against the county except where such expense is provided for in some other classification by this law. This shall constitute the second obligation of the county and all proper claims coming under this class shall have priority of payment over all except class 1."

Section 10914, R. S. Missouri, 1939, which requires the county court to show estimated expenditures for the year by the various classes in part provides:

"The court shall show the estimated expenditures for the year by classes as follows:

* * *

"Class 2. Expense of conducting circuit court and elections, not to include the salary of any

officer or employee on a yearly salary nor deputy or assistant of any kind whatever though on irregular time, such shall be estimated for under class four. Class 2 shall include pay of jurors, witnesses if properly paid by the county, and other incidental court costs, pay of judges and clerks of elections and all other expense of elections chargeable against the county. This estimate shall not be less than last preceding even year in even years and last preceding odd year in odd numbered years."

Section 10912, R. S. Missouri, 1939, makes it the express duty of every county officer, including the county clerk, to furnish on or before January 15th of each year an itemized statement of the supplies he will require for his office. This section provides:

"It is hereby made the express duty of every officer claiming any payment for salary or supplies to furnish to the clerk of the county court, on or before the fif-teenth day of January of each year an itemized statement of the estimated amount required for the payment of all salaries or any other expense for personal service of whatever kind during the current year and the section or sections of law under which he claims his office is entitled to the amount requested, also he shall submit an itemized statement of the supplies he will require for his office, separating those which are payable under class 4 and class 6. Officers who are paid in whole or in part other than out of the ordinary revenue, whether paid by fees or otherwise, shall submit an estimate for supplies in the same manner as officers who are paid a salary out of ordinary revenue. No officer shall receive any salary or allowance for supplies until all the information required by this section shall have been fur-The clerk of the county court shall prepare and file an estimate for his office;

also for the expense of the judges of the county court. If for any year there should not be sufficient funds for the county court to pay all the approved estimates under class 4, after having provided for the prior classes, the county court shall apportion and, appropriate to each office the available funds on hand and anticipated, in the proportion that the approved estimate of each office bears to the total approved estimate for class 4."

Further, in this regard, Section 10915, R. S. Missouri, 1939, provides:

"Not later than the 15th day of January of each year, every officer who expects to claim pay for services or to receive supplies to be paid for from county funds shall submit to the county clerk the information hereinafter specified. state funds are received or expected to be received for all or any part of the expense such shall be considered as county funds for the purpose of this request.) The estimate of each such officer shall cover the entire year beginning January first and ending December thirty-first, both dates inclusive. No pay shall be received by any officer who fails to file this estimate. If any officer's term end other than the thirty-first day of December he shall so state but shall make an estimate for the entire year, as nearly as possible, and if the county court shall be convinced that any officer whose term so expires has willfully failed or neglected to make proper request the court shall make proper estimate and shall charge the shortage to the term of the officer offending. The clerk of the county court shall prepare the estimate for the expense of the judges of the county court and shall file it together with the estimate for his own office with the consolidated budget estimate herein provided for."

Section 11593, R. S. Missouri, 1939, provides that in elections for public officers other than city officers, all ballots and cards of instruction shall be printed at the expense of the county, and reads as follows:

"All ballots cast in elections for public officers within this state shall be printed and distributed at public expense, as hereinafter provided. The printing of the ballots and of the cards of instruction for the electors in each county, and the delivery of the same to the election officers, as provided in section 11598, shall be a county charge, except where the officers to be voted for are exclusively city officers, in which case such printing and delivery shall be a city charge, the payment of which shall be provided for in the same manner as the payment of other county or city expenses."

Section 11594, R. S. Missouri, 1939, imposes the duty on the county clerk to provide ballots for every election of public officers in which electors of the county participate and in part reads:

"Except as in this article otherwise provided, it shall be the duty of the clerk of the county court of each county to provide printed ballots for every election for public officers in which the electors or any of the electors within his county participate, * * *"

Section 11596, R. S. Missouri, 1939, providing for the preparation and distribution of ballots to be used in voting or a proposition or question to be submitted to the people in part reads:

"Whenever the secretary of state has duly certified to the clerk of each county any proposition or question to be submitted to a vote of the people, the clerk of the county court shall prepare and distribute ballots printed in such form as to call for a vote thereon by scratching either the word 'yes' or the word 'no,' * * *"

In the above section we observe that again the duty is imposed on the county clerk to prepare and distribute the ballots.

Section 11597, R. S. Missouri, 1939, providing for the number of ballots to be distributed within the various election districts in part reads:

"The clerk of the county court of each county or the board of election commissioners where there is such board shall provide for each election district in his county fifty-five ballots for each fifty and fraction of fifty electors registered at the time of such election. If there is no registration of voters in the district or precinct, such clerk or such board shall provide ballots to the number of one hundred for every fifty or fraction of fifty electors who voted at the last general election in the district or precinct; * * * *

Again the statute imposes a duty on the county clerk to provide ballots.

While the cost of election supplies which would primarily be the ballots used in elections must be budgeted as required by our county budget law, the duty of preparing, furnishing and distributing the ballots is by statute imposed on the county clerk. It is one of the important duties connected with that office that must be performed by the holder thereof.

Certainly the duty imposed on the county clerk to provide and furnish ballots for elections carries with it or at least by implication invests him with the power to first acquire said ballots, and such acquisition could be made by purchase.

A somewhat analogus situation in which an officer has the right to buy supplies without obtaining authorization from the county court is that of the sheriff purchasing supplies necessary for the upkeeping of the county jail.

In the case of Kansas City Sanitary Company v. Laclede County, 269 S.W. 395 (Sup.), the county sought to avoid payment for supplies furnished to the county at the request of the sheriff for the county jail. In holding the county liable, the court at 1.c. 398 said:

" * * Section 9507 requires that the agent purchasing supplies for the county be lawfully authorized, and this requirement is not

done away with, even though the claim may not be defeated, because the prescribed legal steps have not been followed. No question of that sort can be successfully raised as to any part of the goods ordered for and used at the county jail. Under section 12549 the jail is required to be kept in good and sufficient condition and under section 12551 the sheriff of the county has the custody, keeping, and charge of the jail. He therefore has full authority to purchase all supplies necessary to keep such jail in good and sufficient condition, which includes sanitary condition, and needed no authorization by the county court to render the county liable for purchases for such jail for such purpose. Harkreader v. Vernon County, 216 Mo. 696, 116 S. W. 523."

In the above case, the duty imposed upon the sheriff in keeping the jail in good and sufficient condition carried with it full authority to purchase all necessary supplies to perform this duty without first obtaining authorization from the county court.

Again in the case of State ex rel. Bybee v. Hackman, 207 S. W. 64, 276 Mo. 110, a mandamus proceeding was instituted against a state auditor to compel him to audit for payment an account of the relator for services rendered by him as a stenographer in taking shorthand and transcribing evidence heard by the State Board of Equalization. In issuing the writ, the court at Mo. 1.c. 116 said:

"That question simply stated is this:
Has the State Board of Equalization
authority under the law to employ a
stenographer at the expense of the
State? If such Board of Equalization
(hereinafter for brevity, called
simply the board) has any such
authority, this authority must be
bottomed on some statute. * * * But
it is also well settled, if not
fundamental law, that whenever a
duty or power is conferred by statute
upon a public officer, all necessary
authority to make such powers fully
efficacious, or to render the performance

of such duties, effectual, is conferred by implication (Hannibal, etc., Railroad v. Marion Co., 36 Mo. 303; Walker v. Linn Co., 72 Mo. 650; Sheidley v. Lynch, 95 Mo. 487.) So much being true it is urged that since the statute which defines the duties of the board provides that it may 'take all evidence it may deem necessary,' it follows by necessary implication that a stenographer may be employed to take and transcribe the evidence which the board deems necessary to be taken. We think this contention must be sustained.

In the later case of State v. Wymore, 132 S. W. (2d) 979, 345 Mo. 169, the rule regarding the powers possessed by a public officer in performing the duties of his office was stated as follows at S. W. 1.c. 987-988:

"The duties of a public office include those lying fairly within its scope, those essential to the accomplishment of the main purpose for which the office was created, and those which, although incidental and collateral, serve to promote the accomplishment of the principal purposes.' 46 C.J. Sec. 301, p. 1035.

"The rule respecting such powers is, that in addition to the powers expressly given by statute to an officer or a board of officers, he or it has, by implication, such additional powers, as are necessary for the due and efficient exercise of the powers expressly granted, or as may be fairly implied from the statute granting the express powers.' Throop's Public Officers, Sec. 542, p. 515."

In view of the foregoing authorities, we are constrained to the view that the statutes hereinbefore cited, which imposes on the county clerk the duty to prepare, provide and furnish the principal election supplies, i.e., the ballots, by implication invests him with the power to contract for the purchase of them without first obtaining the approval or authorization from the county court.

CONCLUSION.

Therefore, in answer to the questions submitted, it is our opinion that Section 10932, Mo. R. S. A., relating to the advertising for bids on contracts or purchases involving an expenditure of \$500:00 or more, is not applicable to counties of the third and fourth classes.

It is further our opinion that the county clerk is authorized to contract for the purchase of election supplies without first obtaining the approval or authorization from the county court.

Respectfully submitted,

APPROVED:

RICHARD F. THOMPSON Assistant Attorney General

J. E. TAYLOR Attorney General

RFT/few

HEALTH.

Under facts presented, public officials may not permit reformation of bid.

PUBLIC BUILDINGS:

19/11/49

October 10, 1949

Honorable Samuel Marsh Director Department of Public Health and Welfare Jefferson City, Missouri



Dear Mr. Marsh:

This is in reply to your request for an opinion which reads, in part, as follows:

"Today at 1:30 p.m. we opened bids for the construction of five staff residences to be built at State Hospital No. 1 at Fulton. There were two bidders, Koch-Schroeder Construction Company of St. Joseph was the high bidder and Roy A. Scheperle Construction Company of Jefferson City was the low bidder.

"The Scheperle Company in making up their proposal left the space blank where the base bid should have been entered. Following the space for the base bid were spaces for several separate items, which added to the base bid would produce the total contract price for all of the work to be done.

"The highest bid was opened first and read. When the low bid was opened and read, the contractor immediately called my attention to what apparently was an error in his bidding, the error which I have described in the foregoing paragraph. He claimed the amount in the total contract price space should have been \$115,456.

"The bid bond for the low bidder instead of stating the definite amount of the bid, recited the obligation was to be five per cent of the amount bid which further complicated the matter. Usually the bid bond

states the definite amount of the bid, but the contractor explained this by saying that the bond was made out for submission to him before he had prepared his bid.

"We would like to have your opinion as to whether we can let a legal contract on the basis of a total contract price or \$115,456 or for a lesser sum on the basis of certain deductions we would make from this price according to the alternates which were bid on to get the contract price within the amount of the appropriation which is approximately \$113,000."

In the proposal submitted by the Roy A. Scheperle Construction Company the line for the figure for architectural trades complete has been left blank, and the total contract price bid is Ninety-Two Thousand, Two Hundred and Fifty-Six Dollars (\$92,256.00).

The material part of the proposal is as follows:

"All architectural trades complete, except allowances, (The General Contractor shall verify with his sub-contractors and make sure that the following are in no way duplicated.)

Allowances under Section C, Article 17,
Finishing Hardware - - - - \$1000.00
Allowances under Section C, Article 17,
Toilet Accessories - - - 250.00
Allowances under Section C, Article 17,
Light Fixtures - - - 1000.00
Electrical work complete - - - 4500.00
Plumbing, Sewer and Water 12,500 12,500.00
Heating complete - - - 3950.00

Total Contract Price (Bid) -- Figures) -- \$92,256.00

WRITTEN FRICE Ninty two thousand two hundred

and fifty six dollars."

Thus, on its face, the bid of the Roy A. Scheperle onstruction Company seems to call for a bid of \$92,256.00.

As you state in your request, and according to others present, when the above bid price was announced Mr. Scheperle immediately arose and claimed that a mistake had been made. The mistake claimed is that the price indicated as the total bid price should have been entered on the line provided for architectural trades complete and this figure added with certain allowances and separate items would make a total price of \$115,456.00.

On page 6 of the "Specifications for Architectural and Mechanical Trades for Six (6) Staff Residences for State of Missouri, State Hospital No. 1", there is found certain requirements to be followed by those bidding on the project. Among said requirements are the following:

"1. Sealed Proposals.

Sealed proposals in duplicate on the work described in the following specifications and shown by the accompanying drawings will be received at the office of the Director of Public Buildings, State of Missouri, Capitol Building, Jefferson City, Missouri, up to noon, Central Standard Time, on 1949.

"2 Proposal Prices.

Proposals shall state prices in both writing and figures, lump-sum price, alternate prices, unit prices, and all prices shall be, clearly stated, or bids will be rejected. Proposals shall be signed personally by the bidder, or by a duly authorized officer for a cerporation, and shall give the bidder's business address and telephone number, and such other information as may be requested. (See Sample Proposal sheets Page 4 to 5.)"

You will note that the above requirements call for sealed proposals to be submitted, and that said proposals shall state prices, in both writing and figures, and all prices shall be "clearly stated".

In 43 Am. Jur. at page 805 the rule is set out conterning relief which may be granted a bidder for a public ontract who has made a material mistake of fact in the bid bmitted. The rule is as follows:

"As a general rule, equitable relief will be granted a bidder for a public contract where he has made a material mistake of fact in the bid which he submitted, and upon the discovery of that mistake acts promptly in informing the public authorities and requesting withdrawal of his bid or opportunity to rectify his mistake, particularly where he does so before any formal contract is entered into. This rule is but a particular application of the general rule granting equitable relief by way of rescission from unilateral mistakes relating to material features of a contract which are of such grave consequences as to make enforcement of the contract unconscionable. The fact that the bidder does not seek relief in equity before the acceptance of his proposal by asking reformation or cancelation of his bid does not defeat his right to equitable relief, if, before the bids were opened, he informed public authorities of the fact that he had made a mistake in his bids, and the bidder has been held entitled to relief when the mistake was discovered after the bid was accepted but before he was informed of the award, and he made immediate effort to withdraw his bid. One may, however, forfeit his right to relief by his failure to follow the rules and regulations set forth in the advertisement for bids as to the time when bidders may withdraw their offers. Moreover, where mistakes are alleged, courts must, in order to prevent collusion and fraud by parties making the proposals, inquire carefully into the existence of the alleged mistake and are justified in refusing relief when there is good cause for believing that some other reason than the mere mistake is behind the bidder's unwillingness to perform the contract or his desire to withdraw from the bid. Relief may be denied on the ground that it did not clearly appear that the mistake was one of material fact as distinguished from an unwise, hasty, or careless statement of prices intended to be bid. If the mistake might have been avoided by the exercise of ordinary care and diligence on the part of the bidder he will be denied equitable relief."

While the quoted material and the cases indicate that a court of equity may grant relief in certain cases by way of reformation, we do not believe that a public official whose duty

it is to be t contracts is thereby permitted to exercise equitable powers. "The powers and authority of public officers are fixed and determined by the law." (46 C.J., page 1031.)

In the situation now before us we do not believe it is possible to absolutely determine on the face of the proposal that a mistake has been made. In order to make such determination additional testimony is necessary, and the public officials responsible for the letting of this contract would be placed in a position of weighing evidence and making a decision properly within the province of a court of equity. To allow such a procedure in the letting of public contracts might well place the officers involved in a position where their actions would be open to a suspicion that the award is not being made honestly and in good faith.

It is the duty of public authorities to accept the bid involving the least expenditure of public funds, and public authorities may not cast upon the taxpayers a substantially larger burden than is necessary. In this case, public officials would be expending an amount \$23,100.00 greater than the stated bid price, if reformation should be permitted.

It must be considered that the bidder was aware of the requirements of bidding, and also aware of the consequences of his actions when he submitted his proposal. The mistake, if any, was unilateral, and we do not believe that it is within the province of the public officials to reform the bid so as to permit it to stand at the higher figure. In other instances where there have been irregularities, you have been advised to carefully follow prescribed procedures. We believe that the spirit as well as the letter of the law will be satisfied if all bidders are treated alike and kept on the same footing. It is a simple matter for bidders to follow the bidding requirements in the first instance and when this is done, it becomes a simple matter for public. officials to make awards on a basis fair to all bidders and, at the same time, protect the paramount interest of the public.

CONCLUSION

Therefore, it is the opinion of this department that under the facts presented, public officials are without

legal authority to let a legal contract on the basis of a total contract price of \$115,456, or the alternative of approximately \$113,000, because such sums are greater than the sum stated in the sealed written bid submitted.

Respectfully submitted,

JOHN R. BATY Assistant Attorney General

APPROVED:

J. E. TAYLOR Attorney General

IRB . in

CRIMINAL LAW: Employer may not transport employees to EXPLOSIVES: work in truck in which dynamite is also carried without violating Section 4552.

R.S. Mo. 1939.

November 29, 1949

Honorable Edgar Mayfield Prosecuting Attorney Laclede County Lebanon, Missouri



Dear Mr. Mayfield:

We have your recent letter in which you request an opinion of this office. Your letter is as follows:

> "I would like to respectfully request an opinion of your office on the following proposition: A construction company is engaged in putting up poles for a rural electrification program. The company's employees meet in town each morning, and are transported to and from their place of work in company trucks. These trucks are commonly known as pick-up trucks of small tonnage. The employees are carried in loads of from three or four up to eight or ten in the beds of these trucks. They have no regular place of employment in the county, but move through the county as the construction on the electrical line progresses. These trucks are driven by company employees. The company also carries in these trucks along with the above mentioned employees, dynamite and/or dynamite caps, used by these crews in blasting for the construction of the electrical lines.

"QUESTION: Are the drivers of the trucks of the construction company or its officers, criminally liable under Section 4552, Revised Statutes of Missouri, 1939, which reads as follows:

"'Sec. 4552. Articles not to be transported on passenger trains .-

"It shall not be lawful to transport, carry or convey, or deliver to be transported, carried or conveyed, or to cause to be delivered to be transported, carried or conveyed, any of the substances or articles known as dynamite, dualine, hercules or giant powder, nitroglycerine or glycerine oil, nitroleum or blasting oil or nitrated oil, or powder mixed with any such oil, or fiber saturated with any such article or substance, in any vehicle used or employed in transporting passengers, or in any train of cars used in transporting passengers: Provided, that an ordinary freight train, with a caboose or passenger car used as a caboose, shall not be construed as a train of cars used in transporting passengers within the meaning of this section. (R.S. 1929, Sec. 4163)'

"I would appreciate very much this opinion, as the question has arisen and will have to be determined. The company involved claims the expense of providing a separate truck to haul explosives is too great, and that it will greatly hinder their operations to make such provisions. Considering only the angle of safety of employees, I would think they would be made than happy to supply separate transportation for their men. But they are not, and indicate that unless the men ride on those trucks, they will have to get to work the best way they can. The men are forced to ride in the trucks or quit their jobs, as they have no other means of transportation."

Your question is whether it would be possible to bring the owner and drivers of these trucks under the provisions of Section 4552, R. S. Mo. 1939. This section was originally enacted in 1881 and revised in 1889, 1909 and 1919, but has undergone, for our purposes, no substantial alteration. In particular, the phrase "in any vehicle used or employed in transporting passengers" has been consistently included since the original enactment.

A thorough search discloses that this section has never been construed by the courts of this state, therefore it will be necessary to resort to construction of the statute to ascertain its

applicability here. Section 4554, R. S. Mo. 1939, referring to the present section, is as follows:

"If any person or persons shall knowingly violate any of the provisions of the two preceding sections, they shall be deemed guilty of a misdemeanor, and punished by a fine of not more than five thousand dollars, or by imprisonment in the county jail not exceeding one year, or by both such fine and imprisonment."

Section 4553, R. S. Mo. 1939, the other statute covered by Section 4554, deals only with railroads and does not aid in the construction of the present section. Section 4554, supra, makes a violation of Section 4552 a misdemeanor, hence the latter is a "penal statute which should be strictly construed, although the life and spirit of the statute should not be destroyed thereby." (Brockman Comm. Co. v. Western Union Telegraph Co., 180 Mo. App. 626.)

The caption of the present section is "Articles not to be transported on passenger trains," but this does not limit the application of this statute if the plain wording of this statute is broad enough to clearly include other vehicles. The court in State v. Maurer, 255 Mo. 152, decisively states the law in this matter as follows:

"The heading of chapters, articles and sections in the Revised Statutes are mere arbitrary designations inserted for convenience of reference, and have no legislative authority to lessen or expand the letter or meaning of the law."

Although the title may certainly be considered to aid in resolving ambiguity (State v. Schwartzmann Service, 225 Mo. App. 577), the Maurer case, supra, is the law where the plain wording of the statute is broader than the title. Furthermore, if only trains were intended, the phrase "in any vehicle used or employed in transporting passengers" would have been unnecessary, for the phrase "or in any train of cars" immediately follows the phrase above. As was said in Graves v. Little Tarkio Drainage District No. 1, 345 Mo. 557:

It is presumed that the Legislature intended every part and section of a statute

or law to have effect and to be operative, and did not intend any part or section of a statute to be without meaning of effect."

The pertinent part of the statute, for our purposes, is as follows:

"It shall not be lawful to * * * carry * * or to cause to be carried * * * any * * * dynamite * * * in any vehicle used or employed in transporting passengers * * *"

We are particularly concerned with the phrase "in any vehicle used or employed in transporting passengers," for there seems to be no disputing point that the company in question is "carrying or causing to be carried, dynamite."

The word "vehicles" certainly includes trucks, for as was held in DiGuilio v. Rice, 70 Pac. (2d) 717, 1.c. 719:

"A vehicle is that in or by which any person or thing is or may be carried, especially on land."

The term "used or employed in transporting" is too clear in this case to require further interpretation.

The most difficult word is "passenger." The following language emphasises the difficulty presented by the use of this word: "The definitions that have been given the word 'passenger' are nearly as numerous as the different occasions that have arisen to state its meaning." Sewell v. Atchison, Topeka and Santa Fe Ry. Co., 96 Pac. 1007.

The following cases and citations have given judicial definitions of the word "passenger" and are most helpful and, in fact, conclusive of the question here:

"One riding in a private vehicle, such as a motor vehicle, driven by the owner or his chauffeur, is a passenger for hire where he renders compensation therefor, either by a pecuniary benefit to the motorist, or by a nonpecuniary benefit directly related to the transportation." (Citing cases.)
(13 C. J. S., page 1048.)

"Where relationship between automobile host and party riding with him is one of business, and transportation is supplied in pursuit thereof for mutual benefit, the party is a passenger."

(McCann v. Hoffman, 70 Pac. (2d) 909.)

"A laborer employed to work on the tracks of a streetcar company who travels on the company's car on a laborer's free pass to the place where he is ordered to work, is a passenger, * * *"
(Haas v. St. Louis & S. F. R. Co., 111 Mo. App. 706.)

A case which is very closely in point is Williams v. Union Switch & Signal Co., 158 N. W. 901, l.c. 902, where it was held:

"Where the employer, a switch and signal company, installing electric signals for a railway, was transporting its servants on a gasoline rail car, not as a part of his employment of cleaning out battery wells, but was transporting him to and from a boarding house operated by it, such servant was a passenger."

This next citation from 13 C. J. S., page 1036, indicates the character of the construction company in relation to its employees:

"A private carrier of passengers is one who, without being engaged in such business as a public employment, undertakes to deliver passengers for hire or reward, or even gratuitously."

A further recitation of authority seems unnecessary, as it now manifestly appears that the employees of the construction company are passengers for the purpose of applying Section 4552, supra. The plain intendment of the Legislature was to protect those riding in all types of vehicles, including trucks, and providing that the same people shall not be exposed to the inherent danger of high explosives and motion. Although we have set out ample authority to show that these employees are indeed passengers, we are even more impelled to our ultimate conclusion by the fact that this statute is not primarily concerned, nor was it enacted, to deal with "passengers," as distinguished from other persons, but was manifestly made into law to protect persons in vehicles of all types from the danger of explosives placed in moving vehicles. We have statutes relating to stored,

A. N. P.

stationary explosives, but this statute is one especially designed to deal with dynamite in vehicles which are capable of movement. That the Legislature chose to label all persons in such moving vehicles, for purposes of this statute, as "passengers" is understandable when one fully comprehends the purpose of the statute.

To sum up then, the trucks employed by the construction company for transporting its employees to and from work are "vehicles used or employed in transporting passengers." The employees are passengers because (1) the representative cases show that employees have been called passengers in similar situations, and in fact whether they were passengers was the principal question involved, (2) because the plain purpose of the statute is to protect persons in vehicles from the danger of dynamite in these same moving vehicles, and (3) because the word "passengers" was not used in its technical sense, but rather it was used in its popular meaning, i.e., "riders."

CONCLUSION

It is, therefore, the opinion of this office that the truck drivers and officers of a construction company, which company transports its employees, except of course those necessary for the transportation of the explosives, to and from work in trucks in which there has been placed dynamite and/or dynamite caps, are violating Section 4552, R. S. Mo. 1939.

Respectfully submitted,

H. JACKSON DANIEL
Assistant Attorney General

APPROVED:

J. E. TAYLOR Attorney General oCHOOLS:

ELECTIONS:

BONDS:

A school board may use the funds realized from a bond issue only for the purpose for which the electors of the school district voted the issue. A proposition to change or modify the purpose of the fund cannot be thereafter submitted to the voters.

April 12, 1949

Honorable L. Clark McNeill Prosecuting Attorney Dent County Salem, Missouri



Dear Sir:

Your recent opinion request dated March 21, 1949, reads as follows:

"The Salem School District voted a bond issue three years ago for the expressed purpose of building an addition to an existing grade school building. This purpose was set out in the call for the election and in the notice of the election published in the local newspapers.

"At that time, the money was not actually used because the school board felt that construction prices were to high and that it would be better to wait a time. Since that time it appears that it might be more desirable to build a new building on a different location for a ward school, rather than place an addition onto the old building which will continue in use.

"The board is under the impression that they can not use the funds raised by the bond issue for any purpose other than that for which it was voted by the people, but we want to know further is there is some way in which it can be converted to the new purpose and the thought is that a new proposition might be submitted to the people for the purpose of securing a vote as to whether or not the money could be used for the new purpose. Can the change in purpose be effected in this manner and by what majority would it be necessary that the proposition carry?

"If this can not be done, would it be possible for a new bond issue to be submitted based upon

the new purpose, so that the old bonds could be retired. All of the questions come back to this idea, if the people of the district want their money spent for the new building at the new location, rather than for an addition to the old building, what procedure can be followed to accomplish that purpose."

After the school district election, the district board was authorized to borrow money and issue bonds for the express purpose of building an addition to an existing school building. The bond issue was effected, a fund was created, and this fund as yet has not been used. The question presented is whether this fund may be used for the purpose of building another school building at a new site, abandoning the purpose proposed at the time of the election which authorized the bond issue.

The School Board has authority and can utilize this fund only for the purpose for which it was created. As stated in the case of Horsfall v. School District, City of Salem, 143 Mo. App., 541, 1.c. 544, 128 S.W. 33:

> * * *"As to the intended use of the money, it is sufficient to say that the order of the board providing for the election and the notice of election provide only for the issuing of bonds in the sum of twenty-five thousand dollars for the purpose of erecting a high school building, and the board of directors have no authority to use any of the money they realize from the sale of these bonds for any other purpose. The notice of election notified the voters that this money was to be used for the purpose of erecting a high school building, and they, having voted upon that proposition, the hands of the board are tied, and they cannot use any part of it for the purpose of purchasing a site, nor for paying existing indebtedness, nor for any purpose except that for which it was voted, which is the erection of a high school building."

In the case of Thompson v. City of St. Louis, 253 S.W. 969, 1.c. 972, the City of St. Louis was authorized by its voters to

issue bonds to secure funds for the purpose of establishing and constructing a certain boulevard. The court in this case discussed the obligations incurred by the City of St. Louis as follows:

* * *"Through the receipt of the proceeds of the bonds the city incurred certain obligations, to be sure, but they were essentially those that rest upon the custodian of a trust fund. It was bound to see that the fund was applied to the purposes for which it was created and no other, and that in general was the extent of its obligation in the premises."***

Therefore, it is evident that the School Board can utilize the fund in question only for the purpose for which it was created, and that it has no authority to use the proceeds for the building of a new school at a different site.

Nor would the submission of a new proposition to the voters for a renewal bond issue to retire the existing bonds be of any aid in the matter. Such action would merely create another fund to be used only for the purpose for which it was created, while the prior fund would remain and could be used only as originally authorized.

The only possible way in which the school board might be able to acquire authority to use the fund for a purpose other than that set forth in the original election proposition is to submit to the electors of the district another proposition providing that the original purpose be abandoned and the fund be used for the purpose presently desired. The question is whether this can legally be done.

School Districts are creatures of statute, and as such, have only such rights and powers as given them by statute. There are no Missouri statutes which provide for re-submission of a proposition to the electors of a school district, after a bond issue has been voted, to change the purposes of such bond issue.

It is true that the Iowa Court in Hibbs v. Adam Township, 110 Iowa 306, 81 N. W. 584, held that the right of a district to vote a school tax by necessary implication was also the right to rescind that vote. In this case, however, the recission vote occurred before the proposed tax had been collected, levied or certified. The court also specifically stated that the district has this right to rescind

only if in so doing they do not interfere with vested rights.

In Benjamin v. District Township of Malaka et al., 50 Iowa 648, a tax to raise money for the building of a school house at a certain designated site had been voted, levied and collected. At 1.c., 650, the court said:

* **"After the tax had been collected and this action commenced, the electors, at the annual meeting in 1878, rescinded their previous action in relation to the erection and appropriation for the house in question. By the payment of the taxes levied and collected for the purpose of erecting the house, the plaintiff's right thereto became vested, and no subsequent action of the electors, without his consent, could have the effect of depriving him of such right." * *

In a village election in the State of New York the electors of the village adopted a proposition to construct a certain street and authorize the trustees of the village to issue bonds and raise funds for such construction. The bonds were issued. Thereafter two propositions were submitted at a subsequent election, the first as to whether the trustees shall be authorized and instructed to refrain from contracting for the construction previously voted on, and the second proposition as to whether the construction should be undertaken at another location. The court in People ex rel., Osborn v. Bellport, 196 N.Y. Sup. 459, 1.c., 460, said:

* * *"Can proposition I be regarded as a question which may be lawfully decided at an election? That proposition would, in substance, be resubmitting to the electors a proposition upon which they had already voted and adopted. No provision is found in the Village Law for the resubmission of a proposition already adopted. There was an election. The right of the electors is exhausted. There could be no finality to elections, were it possible to resubmit propositions already adopted.

The intent in proposing proposition No. 2 was undoubtedly to find a use for the moneys which had already been raised pursuant to the proposition

which was adopted on March 16, 1920. In addition to the reasons specified above it would seem that the appropriation of the moneys for a purpose other than that for which it was raised would be an illegal and improper diversion of said fund."

Again in Independent School District v. Rosenow, 240, N. W. 649, 1.c. 650, 185 Minnesota 201, 79 A. L. R. 434, the court stated:

* * *"We hold therefore that the voters of a school district may, in properly called meeting, rescind the action taken at an earlier election authorizing a bond issue, provided, of course, that the bonds have not been issued in such fashion as to bind the district contractually and beyond its power to withdraw. Had the proposed bond issue now under consideration gone that far, doubtless an injunction against the holding of an election to rescind the authority therefor would have been inescapable. But the state board of investment, acting within its statutory power, has declined to issue the bonds; that is, it has refused to accept final delivery thereof for the very purpose of being at liberty to return them to the district without obligation upon the latter if the proposed election shall be held and the authority first given for the bond issue is thereby rescinded."

CONCLUSION

It is therefore the opinion of this department that after the electors of a school district have authorized the school board to issue bonds for the purpose of erecting an addition to an existing school building and after such bonds have been issued and a fund created, the school board has authority to use this fund only for the purpose for which it was created and there cannot be submitted to the voters a new proposition providing for changes or modifications in the purpose of such fund.

Respectfully submitted,

APPROVED:

RICHARD H. VOSS Assistant Attorney General

J. E. TAYLOR Attorney General

RHV:p

SHERIFFS:

Sheriff must pay for own surety bond unless county court specifically requests that sheriff give surety bond. Sheriff has custody of jail but of no other part of court house.

February 1, 1949

Mr. Roy C. Miller Prosecuting Attorney Marshfield, Missouri

Dear Sir:

This office is in receipt of your recent request for an official opinion. In your letter you state, in part, as follows:

"One thing I would appreciate an opinion on is the liability of the county court to pay for a surety bond for the sheriff in a county of the fourth class. The bond of which I am speaking is the performance bond required by statute.

"I would also like to request an opinion defining the rights and duties of the sheriff as relates to the custody and care of the jail and court house in general. In our county the jail is on the top floor of the court house and the sheriff has living quarters in the court house."

In answer to your first question I call your attention to an opinion given by this office on January 5, 1948, which I believe answers this question. A copy of this opinion is enclosed.

In answer to your second question we would call your attention to Section 9195, R. S. Mo. 1939:

"The sheriff of each county in this state shall have the custody, rule, keeping and charge of the jail within his county, and of all the prisoners in such jail, and may appoint a jailer under him, for whose conduct he shall be responsible; but no justice of the peace shall act as jailer, or keeper of any jail, during the time he shall act as such justice."



Mr. Roy C. Miller

We would further call your attention to Section 9210, R. S. Mo. 1939, which reads:

"Whenever the sheriff of any county in this state shall be of opinion that the jail of his county is insufficient to secure the prisoners that shall be confined therein, it shall be his duty to give notice thereof to the county court, and the said court, if they cannot immediately repair the same, may, if they deem it expedient, allow any sum, not exceeding one hundred and fifty dollars per annum, for the pay of a deputy jailer."

We would also call your further attention to Section 13730, R. S. Mo. 1939, which states:

"The county court of each county shall have power, from time to time, to alter, repair or build any county buildings, which have been or may hereafter be erected, as circumstances may require, and the funds of the county may admit; and they shall moreover, take such measures as shall be necessary to preserve all buildings and property of their county from waste or damage."

We would further call your attention to Section 2480, Art. XIII, Ch. 10, R. S. Mo. 1939, which is as follows:

"The said court shall have control and management of the property, real and personal, belonging to the county, and shall have power and authority to purchase, lease or receive by donation any property, real or personal, for the use and benefit of the county; to sell and cause to be conveyed any real estate, goods or chattels belonging to the county, appropriating the proceeds of such sale to the use of the same, and to audit and settle all demands against the county."

We would call your further attention to Section 9214, R. S. Mo. 1939, which states:

Mr. Roy C. Miller

"It shall be lawful for the sheriff of any county of this state, when there shall appear to be no jail, or where the jail of such county shall be insufficient, to commit any person or persons in his custody, either on civil or criminal process, to the nearest jail of some other county; and it is hereby made the duty of the sheriff or keeper of the jail of said county to receive such person or persons, so committed as aforesaid, and him, her or them safely keep, subject to the order or orders of the judge of the court for the county from whence said prisoner was brought."

CONCLUSION

It is, therefore, the opinion of this office that a sheriff must pay for his own surety bond unless the county court specifically request that the sheriff give a surety bond, in which latter case the county court is liable to pay the cost of said bond.

It is the further opinion of this office, in answer to your second question, that a sheriff has custody of the jail but not any other portion of the court house, and that the sheriff cannot order alterations to be made in the jail.

Respectfully submitted,

HUGH P. WILLIAMSON Assistant Attorney General

APPROVED:

J. E. TAYLOR Attorney General

HPW: mw

ELECTIONS: Board of Election Commissioners of Jackson County empowered to alter election precinct boundaries within fire protection district. Cost of election within such fire protection district to be borne by such district.

March 10, 1949

3.14



Mr. John W. Mitchell, Secretary Jackson County Board of Election Commissioners Court House Independence, Missouri

Dear Sir:

Reference is made to your request for an official opinion of this department reading as follows:

"I have been instructed by the action of this Board to write you requesting the following opinion.

"We have been advised by the Inter-City Fire Protection District of Jackson County, Missouri, as organized under Act of 1947 General Assembly that they intend to hold an election on April 5th, 1949, for the . purpose of electing Directors for their district. Part of this district is outside the corporate limits of Independence and part of it is in a portion of the corporate limits of Independence. desire to and have asked this Board to consolidate the precincts outside the corporate limits of Independence so as to save money. Independence is conducting their regular City Election on that day so we will not be able to consolidate the precincts within the corporate limits. Therefore, the question is may we consolidate the district outside the corporate limits of Independence for the purpose of this Fire District Election.

"Another question which has arisen is whether the County is liable for the expense of this election or if the Fire District is. * * * * * * * *

Fire protection districts of the type referred to in your letter of inquiry are governed by the provisions of an act found Laws of Missouri, 1947, Volume I, page 432, now appearing as Section 13927.58, et seq., Mo. R.S.A.

Section 13927.58, with reference to elections conducted within such fire protection districts, reads in part as follows:

"Except as otherwise provided in this act, all elections herein provided for shall be held and conducted and the returns thereof made, examined, and cast up in the same manner and in all respects as in elections for state and county officers."

This provision places the conduct of such elections under the jurisdiction of the Jackson County Board of Election Commissioners as established under Article 17, Chapter 76, R. S. Mo. 1939. Section 11858 of such article enumerates said elections as to which the provisions of such article are inapplicable. Among such enumerated elections we do not find those of the nature referred to in your letter of inquiry, and, therefore, conclude that the general provisions relating to the Board of Election Commissioners of Jackson County are applicable.

In this regard your attention is directed to Section 11853, R. S. Mo. 1939, authorizing the Board of Election Commissioners of such county to establish and alter election precincts. This statute reads as follows:

"The board of election commissioners of such counties in this state shall have power to divide any township in their respective counties into two or more election precincts, and to alter such election precincts from time to time as the convenience of the inhabitants may require; and the precincts so established shall be numbered consecutively."

It therefrom appears that adequate authority has been vested in the Board of Election Commissioners of Jackson County to alter the boundaries of those election districts which are encompassed within the boundaries of the fire protection district but are without the corporate limits of

the City of Independence, provided that the boundaries of such new election precinct or precincts are entirely within one township. It will, of course, be necessary that the provisions of Section 11854, R. S. Mo. 1939, be followed in order that the propriety of such order altering such boundaries be established.

It seems to us that it then follows that the Board of Election Commissioners has the authority to consolidate all of such election precincts as may lay within one township but without the corporate limits of the City of Independence. It seems that Section 11853, R. S. Mo. 1939, quoted supra, is but a delegation of authority to establish more than one such election precinct as the convenience of the inhabitants of each township might require, but is not a limitation upon the authority of such Commission to consolidate all or a portion of such election districts. In this regard your attention is directed to Section 11448, R. S. Mo. 1939, applicable generally to all elections wherein recognition is given to the existence of townships forming a single election district.

With respect to the second question you have proposed, we direct your attention to subsection (m) of Section 13927.79, Mo. R.S.A., reading as follows:

"To pay all court costs and expenses connected with the first election or any subsequent election in the district."

Giving due regard to the rule of statutory construction that the General Assembly will not be deemed to have done a useless thing and that meaning must be accorded to every word and phrase found in a statute when possible, and further giving due regard to the prime rule of statutory construction that the intent of the General Assembly must be ascertained and when ascertained must be followed in construing a statute, we reach the conclusion that the inclusion of the quoted portion of this statute clearly discloses a legislative intent that the expenses incident to the conduct of an election within a fire protection district are to be borne by such district.

CONCLUSION

In the premises, we are of the opinion that the Board of Election Commissioners of Jackson County, Missouri, has the

authority to alter the boundaries of existing election precincts lying within the boundaries of a fire protection district established under the provisions of Section 13927.58, et seq., Mo. R.S.A., and without the corporate limits of a city forming a part of such district, provided that the boundaries of such new election precinct or precincts are entirely within one township. It is our further thought that such power to alter includes the power to consolidate all of the area of such fire protection district as is within one township but without the corporate limits of the City of Independence into one election precinct.

We are further of the opinion that the expenses incident to the conduct of an election held within such fire protection district are to be borne by said district.

Respectfully submitted,

WILL F. BERRY, JR. Assistant Attorney General

APPROVED:

J. E. TAYLOR Attorney General

WFB:VLM

SCHOOLS: Majority of quorum of coun school board has power to approve county reorgani tion.

April 27, 1949

4-27



Honorable Stephen J. Millett Assistant Prosecuting Attorney Caldwell County Kingston, Missouri

Dear Sir:

This is in answer to your letter of recent date requesting an official opinion of this department and reading as follows:

"The Caldwell County Board of Education has requested an opinion on the question of the number of votes required to carry a motion or plan before their board when only four or five members of the board are present.

* * * * * * * * * * *

"The County reorganization plan must be submitted by May 1st, 1949, but all six of the members cannot attend the meetings because of illness. If all six were present then it is agreed that a majority or four members must agree or vote for any plan or motion for it to carry. If five members are present and the vote is three in favor of the plan or motion, two against, should the same be declared carried?"

Section 4, Laws of Missouri, 1947, Vol. II, page 370, provides in part as follows:

"Four members of the board shall constitute a quorum. * * * "

"Quorum" is defined in Webster's New International Dictionary as "such a number of the officers or members of any body as is, when duly assembled, legally competent to transact business." Since a "quorum" is defined as the number necessary to transact business, we believe it to be obvious

that a majority of a quorum has power to act upon a plan or motion presented to such quorum. Therefore, we believe that where four or five members of the county school board are present at a meeting and thereby constitute a quorum that a majority of three members is sufficient to pass or defeat a plan or motion before such board for action.

CONCLUSION

It is the opinion of this department that when four or five members of a county board of education are present at a meeting of such board, and that a majority of three votes are cast in favor of any motion or plan before the board, that such motion or plan is carried.

Respectfully submitted,

C. B. BURNS, JR. Assistant Attorney General

APPROVED:

J. E. TAYLOR Attorney General

CBB: VLM

GUARDIANS COUNTY COURT

PUBLIC ADMINISTRAT#0RS) Public Administrator appc-nted Guard. 1 of) incompetent persons receiving old age assis-) tance cannot be paid commission from county funds.

June 18, 1949

Honorable Edwin Mills Prosecuting Attorney St. Clair County Osceola, Missouri

Dear Sir:

Your letter at hand requesting an opinion of this Department on the question whether or not the public administrator in your county, who has been appointed guardian of twelve mentally incompetent individuals receiving old age assistance grants, can be paid a fee of five percent by the County Court from county funds.

We regret that we have not been able to give your request more prompt attention, but due to the many opinion requests that have come into this office prior to yours, we have been unable to do so.

Reference is made in your letter to Section 9417, Laws of Missouri 1941, page 647, apparently for the purpose of inquiring as to its application to the questions transmitted. This Department under date of June 11th, 1948, rendered an opinion to the Probate Judge of Cape Girardeau County involving the interpretation and application of that section. We herewith enclose a copy of that opinion.

Obviously, it was the intention of the Legislature as manifested in the first paragraph of Section 9417, supra, to relieve those impecunious persons relying on old age assistance, who are also incompetent, from the further economic hardship of paying fees or other expenses incident to guardianship proceedings when a guardian is appointed for them.

The statute in effect declares that upon a finding by the Probate Court that the aged person is unable to assume such expense, the "fees or other expense," using the language of the statute, which are incident to guardianship proceedings shall be waived. We believe the language of the statute is sufficiently liberal to relieve such aged persons from payment of any court costs incident to said proceedings, and it is our further thought that it relieves them from payment of any guardianship fees which we believe would be encompassed by the words of the statute, "other expense."

To ascertain whether or not the county court can pay the public administrator the fee requested, we must look for other statutory authority, for the contracting of indebtedness by a county is dependent upon such authority. Thus, the rule appears in Vol. 14, Am. Jur., Section 6162, p. 222:

"A county has only such powers and authority as may be conferred upon it by the legislature; and while the county board acts for the county in financial matters, its authority in these respects extends only so far as the statutes provide. * * *

"Taking the view that the power to incur indebtedness is not essential to the purpose for which counties are created, it has been held that they have no authority to contract debts without an express grant of power for that purpose. * * *"

Looking to the statutes relating to compensation of guardians and curators, we find that their compensation is left largely with the discretion of the Probate Court. Section 435, R. S. Missouri 1939, in Article 16, styled, Guardians and Curators of Minors, in part, provides:

"Guardians and curators shall receive such compensation for their services as the court shall decide to be just and reasonable, * * *"

Cases under this section holding that the matter of allowing compensation to guardians is within the discretion of the Probate Court are In Re Switzer, 201 Mo. 66, 98 S.W. 46; Berry v. Berry, 218 S.W. 691.

While there is no statute specifically relating to compensation of guardians of mentally incompetent persons, as does Section 435, supra, in connection with guardians of minors, the Appellate Courts have recognized that their compensation is also within the discretion of the Probate Court and usually is arrived at on a percentage basis. State to Use of Lancaster v. Jones, 89 Mo. 470; Noelke v. Jenny, 298 S.W. 1055. Of course, neither the statute nor the cases

provide that the compensation of guardians may be paid by the county court from public funds.

Relating to the compensation of public administrators, Section 298, R. S. Missouri 1939, in part, provides:

"He shall receive the same compensation for his services as may be allowed by law to executors and administrators, unless the court, for special reasons, allow a higher compensation. * * *"

The above section in providing for the compensation of public administrators refers to the compensation of executors and administrators as allowed by law, which is five percent of the personal property, Section 220, R. S. Missouri 1939.

None of the sections of the statutes cited provide for or permit the county court to pay any of the compensation or fees of executors, administrators or guardians, nor do we find any other statutory authority which would permit this to be done. Under Section 295, R. S. Missouri 1939, the office of public administrator is a public, elective office, ergo, the person holding said office is a public officer.

Generally, the rules expounded by the court relating to the compensation of public officers are strictly construed against the officer. The Supreme Court of Missouri has declared that the method of compensating public officers is confined to the particular manner provided by the Statute. Thus, in Nodaway County v. Kidder, 129 S.W. (2d), 857, 1. c. 860, the court said:

"The general rule is that the rendition of services by a public officer is deemed to be gratuitous, unless a compensation therefor is provided by statute. If the statute provides compensation in a particular mode or manner, then the officer is confined to that manner and is entitled to no other or further compensation or to any different mode of securing same. * * *"

CONCLUSION.

It is therefore our view of the matter, and such is our opinion that the public administrator in your county, who has been appointed

Hon. Edwin Mills

guardian of certain mentally infirm persons receiving old age assistance, cannot be paid his five percent commission by the county court from public funds.

Respectfully submitted,

APPROVED:

RICHARD F. THOMPSON Assistant Attorney General

J. E. TAYLOR Attorney General

RFT/few

STATE SOIL DISTRICTS COMMISSION:

In the election of soil district supervisors in a previously organized district balloting may be wholly by mail according to rules and regulations promulgated by the State Soil Districts Commission

October 5, 1949

Missouri State Soil Districts Commission Columbia, Missouri



Gentlemen:

In regard to your request for an official opinion of this office, your request reads as follows:

"The soil conservation districts in Missouri have been following the practice of voting for district supervisors by mail. The procedure has been for the secretary of the district supervisors to send ballots on post cards, carrying at least three candidates for the office of supervisor, to each land representative on record in the district. The land representative is requested to indicate which of the candidates he chooses for district supervisor, or write in any additional names if he desires, and return this ballot to the secretary of the supervisors. This procedure gives each land representative in the district an opportunity to vote on supervisors. However, the question has been raised as to the legality of this method of electing supervisors. I would appreciate having your opinion regarding this question."

Your Commission is authorized and empowered under the Soil Conservation Districts Law, 1943, Laws of Missouri, page 842, Section 3, in Subsection 4b to formulate and fix the rules and procedures for fair and impartial selection of soil district supervisors, and at Section 5 of the same Act the law provides that a board of soil district supervisors to act as a local governing body of said soil district shall be composed of five members and that four of said members shall be elected by the majority vote of land representatives under rules and procedures formulated by the Soil Commission and that a soil supervisor shall receive no compensation for his services, but he shall be entitled to his expenses, including travel expenses necessarily incurred in the discharge of his duties as a member of this board.

You have submitted instructions or rules that you have formulated for electing soil district supervisors by mail in previously organized

soil districts. The instructions should be designated as rules and regulations for the election of soil district supervisors. Your instructions provide for the mailing to each land representative of a ballot printed on a postal reply card which provides for the payment of postage in order to vote. The instructions do not require that the ballots be numbered. The instructions do contain the voting instructions and provide for instructing the voters on how to vote on the business reply card or ballot. Your ninth instruction provides that on the day following the final date for getting in the votes, the votes for all areas should be tallied on a tally sheet like the one attached by two or three judges appointed by the extension sponsoring board.

The 1945 Constitution of the State of Missouri provides in Article VIII, Section 3, thereof, that all elections by the people shall be by ballot or by any mechanical method prescribed by law. Every ballot voted shall be numbered in the order received and its number recorded by the election officers on the list of voters opposite the name of the voter. All election officers shall be sworn or affirmed not to disclose how any voter voted. Section 7 of Article VIII of said Constitution provides that the qualified electors of the state who are absent, whether within or without the state, may be enabled by general law to vote at all elections by the people. This last section contemplates absentee voting by mail.

Section 3a of the Soil Conservation Districts Law, Laws of Missouri 1943, page 843, provides:

"Wherever in this Act a referendum is provided for and is used, it shall be conducted by secret ballot in such a manner that any person connected with, or any official of such referendum or election cannot know how any land representative votes. * * * *"

This reference is, of course, to the referendum on whether or not a soil district shall be organized or whether or not a previously organized soil district shall be disorganized. A referendum broadly speaking, is the reservation by the people of a state or local subdivision thereof of the right to have submitted for their approval or rejection, under certain prescribed conditions, any law or part of a law passed by the lawmaking body. State ex rel. Drain v. Becker, 247 S.W. 229, l.c. 230; Words and Phrases, Vol. 36, page 619. The election of the supervisors would not be a referendum but an election of the managing officers of the soil district, but this section does show that the Legislature wishes the election to be a secret election. A referendum could not be held by the casting of ballots by mail because this section clearly indicates the ballot boxes shall be used as in any general election in this state.

Section 11524.2, Mo. R.S.A. provides for the application for an absentee war ballot to be voted in a general or special election by an absentee voter in military service and provides that the application may be by post card or any written request. Sections 11470 to 11478a of Mo. R.S.A. provides for the casting of absentee ballots by mail of qualified voters who are within the state of Missouri but absent from the county in which they are qualified to vote. House Bill No. 5 enacted by the 1949 Missouri Legislature provides that any person, except those in the armed services expecting to be absent from his county on any special, general or primary election day or is ill or physically disabled from going to the poll may vote an absentee ballot. Application for the ballot can be made in person or by mail. Section 11474 of this new law, which will become effective October 14, 1949, provides that an envelope containing the ballot shall be sent by mail by the voter, postage prepaid, to the officer issuing the ballot, or may be delivered in person. Section 11481 of this Act provides that this method of voting is in addition to the method now provided by statute in cases where the voter is present at the polling place in the county where he resides on the day of such election.

There is no constitutional or statutory provision in this state prohibiting the voting by ballot by mail. The election of soil district supervisors must be held according to the rules and procedures formulated by your Commission which will insure a fair and impartial election.

The Supreme Court of Colorado, en banc, held in People ex rel. Cheyenne Soil Erosion District v. Parker et al, 192 Pac.(2d) 417, 1.c. 420, in a case involving the legality of a referendum on the question of the continuation of a soil erosion district in that state as follows:

"It is thoroughly settled that a district such as the one here involved, is a public corporation, but not a city, town or municipality within the meaning of the constitutional provision. The purposes of the district, as expressly set forth in the act, are, as the trial court expressly found, primarily of a private nature for the mutual benefit of the landowners of the district.* * *"

"We have heretofore shown that the relator is a public corporation and not a municipal corporation. The so-called election upon the question of adopting land use ordinances is not an election within the Constitutional provision, but is more in the nature of an

election held by the stockholders of a private corporation in the management of its affairs. The questions as to whether or not a voter at such election is a 'qualified elector,' whether he may vote by proxy, or whether such voter is a corporation or an individual. or whether he resides in Colorado or elsewhere, are wholly immaterial. The relator, as the trial court found, was primarily organized for the benefit of the owners of the land in the district. The owner's interests are in no way affected by their place of residence. They have a legal right to own real estate in Colorado regardless of their place of domicile and to take all legal means for the improvement and protection of such property. Their right to vote for or against the creation of a district or for or against the adoption of land use ordinances, springs from ownership of land."

* * * * * *

"* *Relator's counsel in this connection say in their brief: 'In the first place, the fundamental purpose of the Soil Conservation Act is to give to the people in any area within the state of Colorado a means or agency through which the damage to the soil and natural resources by reason of wind or water erosion can be minimized or eliminated.' If, as counsel says, the fundamental purpose of the act is to minimize and eliminate damage to land from soil erosion, the landowner, whether a corporation or an individual, and regardless of place of residence, has a legal right to a voice therein.* * *"

On the question of whether or not the rules are reasonable, I wish to call your attention to the fact that the election of the lawyer members of the Judicial Commission of the State of Missouri is by mail. The 1945 Constitution of Missouri at Article V, Section 29d, provides among other things "all such Commissions shall be administered, and all elections provided for under such section shall be held and regulated under such rules as the Supreme Court shall promulgate." This referred to the election of the lawyer members of the Judicial Commission which nominates three lawyers to be submitted to the Governor to fill any vacancy upon the appellate courts of this state. This Commission has six

members and a chairman who is the Chief Justice of the Supreme Court.

The Supreme Court of Missouri under the power granted to it by the Constitutional provision, cited above, provided for the election of the lawyer members to this Commission by ballots mailed to the clerk of the court of appeals of the appellate district in which the voter resides. Their rules (10.5) provides that twenty days before the election, the clerk shall mail at least one ballot to each member of the Bar in good standing residing in such appellate district and that he shall mail a separate card with each ballot placing thereon the same number that he places upon the accompanying ballot. On such card the voter shall write his residence address, signature, and mail or send it with his ballot to the clerk. rules provide that upon canvassing the ballots the clerk of the court of appeals shall place all ballots in one package and signatures cards in another and that they shall be retained for a period of six months and permit no one to inspect same except upon an order of the Supreme Court and that the clerk and canvassers shall not disclose how any voter cast his ballot except upon an order of the Supreme Court. The election of members to the Judicial Commission is an important election because the six members on that Commission represent all the voters of the State of Missouri in the nomination of candidates who may be appointed judges of the appellate courts of our state. The Supreme Court under its powers to make rules regarding the election of members of this Commission have found that voting by mail is a reasonable and expedient means of conducting the election. Therefore, upon the expression of the Legislature that absentee ballots may be cast by mail and that ballots by persons who are ill and unable to go to the polls may be cast by mail, and upon the fact that the Supreme Court of Missouri has established the procedure of voting by mail, this office is of the opinion that balloting by mail for the election of soil district supervisors, if the district has been organized, is a reasonable method.

Upon the question of whether or not balloting by mail provides a fair and impartial election I would like to point out that your instructions or rules for conducting the election by mail do not provide for the numbering of the ballots as required by the Constitutional provision cited above.

The case of Stranghan v. Meyers, 268 Mo. 580, 1.c. 589, holds that "the word vote means suffrage, voice, or choice of a person for or against a measure or the election of any person to office." It also holds that the word ballot is the means or instrument by which a person votes. This case also holds (see page 591) that the purpose for numbering the ballots is to provide the means of contesting the elections and preserving evidence so that it may be used for this purpose. The casting of ballots by mail can be

as fair and impartial as casting ballots in polling places in person by the voter, provided means are established to insure that the ballots cast are voted by qualified voters and that not more than one vote is cast by a qualified voter. Since the office of the soil district supervisor does not pay a salary we assume that there is no spirited contest for the office by landowners in the district but your rules must provide that the ballots be numbered and a means be established for the identification of the voter who casts any certain ballot. We believe that the rules established by the Supreme Court of Missouri, Rule No. 10.5, for the election of members of the Judicial Commission by mail should be studied by you in formulating the rules for the election of supervisors by mail because their rules provide for the numbering of the ballots and the use of a separate signature card with the same number thereon as on the ballot mailed to the voter. Their rules provide that no ballot shall be counted unless cast by a member of the Bar in good standing and the qualifications specified by the Constitution. They determine from the signature card whether the ballot using that same number shall be opened and counted. by a qualified voter, it is opened and counted.

Another test as to the fairness of the election would be the provision for the nomination of candidates for office of supervisor. Your rules or instructions do not contain a plain provision for the nomination of supervisors. The instructions for the nomination of supervisors are comingled with instructions for articles in the newspapers. Your rules for nominations should set forth as a definite rule how the candidates for supervisors must be nominated. requirement that nominations may be made by petition of at least twenty-five farm-owners may be too high. The Supreme Court provides that nominations for candidates to be voted for membership on the Judicial Commission may be by petition signed by not less than twenty members of the Bar in good standing in such appellate district and that said petitions must be filed with the clerk not later than thirty days prior to the election. There are more lawyers in any appellate district in Missouri than there would be land representatives in any county with a soil district. Your rules should enable any reasonable number of land representatives to nominate a candidate for the office of supervisor in their part of the soil district.

Your instructions for the counting of the votes should be definite and provide that they should be counted by a definite number of canvassers or judges. Your instructions provide that they shall be counted by two or three judges. This is indefinite in that they might choose two or they might choose three judges.

Therefore, if your rules are amended to provide for the numbering of the ballots and for definite procedure to be followed in nominating candidates for the office of supervisor, and for a definite number of judges or canvassers to county the ballots and

to record the names of the voters who voted, then the election of the supervisors for the soil district would be fair and impartial in our opinion.

CONCLUSION

It is the opinion of this office that in the election of soil district supervisors of previously organized districts that votes may be cast wholly by mail by the land representatives of said soil districts provided that the ballots so cast by mail are properly numbered and counted and that same is all done in accordance with the rules and regulations promulgated by the State Soil Districts Commission.

Respectfully submitted,

STEPHEN J. MILLETT Assistant Attorney General

APPROVED:

J. E. TAYLOR Attorney General Tennessee-Missouri Bridge Commission. Questions relating to the administration of the Tennessee-Missouri Bridge Commission as a division of the Department of Business and Administration.

October 20, 1949

10/27/49

Missouri State Department of Business and Administration Bert Cooper, Director, State Office Building, Jefferson City, Missouri.



Dear Sir:

In reply to your recent letter requesting an opinion of this department relating to the Tennessee-Missouri Bridge Commission, we are advised that the consent of Congress is provided for in a resolution now pending and that the passage of the same is expected very shortly. The opinionshereinafter stated are applicable when the consent of Congress has become effective.

1. Your first question reads: Is it necessary for the Tennessee-Missouri Bridge Commission to incorporate under the corporation laws of Missouri in order to issue and sell bonds, collect tolls and carry out the other provisions of law?

A compact between Tennessee and Missouri creating a Tennessee-Missouri Bridge Commission is included as a part of Senate Bill 153, which provides: "There is hereby created a Tennessee-Missouri Bridge Commission which shall be a body corporate and politic and which shall have the following powers and duties. * * * " (Those powers and duties are then enumerated).

It would seem unnecessary for the commission to incorporate under the general corporation laws of Missouri (or of Tennessee and qualify to do business in Missouri). The powers, duties, rights or liabilities of this commission, created as a corporate body by the general assembly, are fixed by statute and by a compact between the states and could neither be extended nor diminished by incorporation under general corporation laws.

Article XI, Sec. 2 of the Missouri Constitution provides:

"Corporations shall be organized only under general laws. No corporation shall be created, nor shall any existing charter be extended or amended by special law; nor shall any law remit the forfeiture of any charter granted by special act. All existing charters, or grants of special or exclusive privileges, under which a bona fide organization was not completed, and business was not being done in good faith at the adoption of this Constitution, shall thereafter have no validity."

This section from the Constitution is applicable to the formation of private corporations. It would seem to have no application to the organization of the agency in question.

Article III, Sec. 40 (29) of Missouri Constitution provides:

"The general assembly shall not pass any local or special law: * * *(29) relating to ferries or bridges, except for the erection of bridges crossing streams which form the boundary between this and any other state."

The general assembly is thus authorized to enact special legislation relating to the erection of bridges crossing streams which form the boundary between this and another state.

In Kansas City Bridge Co., v. Alabama State Bridge Corp., (59 F. (2nd) 48) the court said:

"It is clear the whole purpose of the act was to erect bridges essential to the highway system, to pay for them with tolls, and then to make them free for use of the public. It is well settled that the construction of public roads and bridges is a governmental function. Dodge County Commissioners v. Chandler, 96 U.S. 205, 204 L. Ed. 625; Atkins v. Kansas, 191 U.S. 207, 24 S. Ct. 124, 48 L. Ed. 148. The state may either perform this function in its own name or through its public officers or one of its governmental agencies. Fitts v. McGhee, 172 U.S. 516, 19 S. Ct. 269, 43 L. Ed. 535.

"The Alabama Bridge Corporation was but an agency or instrumentality through which the state acted in causing its public bridges to be constructed. It was not a private corporation in any sense of the word, but state officials, who might as well have been designated a board or commission, were ex officio members, and the only members of it. In the nature of things the state had to choose some such agency in order to effectuate its purpose."

A private corporation is generally defined as one formed by the voluntary agreement of its members for private purposes. Whereas, here we have the people of two states entering into a compact through their respective state legislatures, and the commissioners appointed by the governors of each state to create an agency for a public purpose. It would not seem necessary to organize such an agency created for a public purpose by the state legislatures under the general corporation laws.

2. Your second question reads: Since it will be necessary for the Tennessee-Missouri Bridge Commission to establish and maintain an office and headquarters from which to conduct their business, may such headquarters be established and operated at any place designated by the commission?

Senate Bill 153 and 154 did not provide for the location of an office for the commission. It would seem the location of the commission's office space is left within the discretion of the commission.

of course, if the location of the commission's office had been expressly provided for in the compact then it probably would not be authorized to select a different location. In the absence of an express prohibition, the commission has, as an incident to its general powers, those powers necessary for carrying out its duties; these powers may be implied from those expressly granted the commission as necessary in the discharge of its obligations. Absent any provision for the location of an office it may be implied the selection is within the discretion of the commission.

3. Your third question reads: Since no appropriation was made to pay initial expenses to set up and get this agency into operation to earn a toll, will the Tennesse-Missouri Commission have the legal right to borrow money for operating expenses and pay obligations later?

Senate Bill 153 of the Sixty-fifth General Assembly provides as a part of the compact between Missouri and Tennessee that the commission shall have the power and duty:

- "3. To contract, to sue and be sued in its own name; to purchase or otherwise acquire, hold and dispose of real and personal property:
- "5. To issue bonds on the security of the revenues derived from the operation of the bridg and ferries for the payment of the cost of the bridge, its approaches, ferry or ferries, and the necessary lands,

easements and appurtenances thereto including interest during construction and all necessary engineering, legal, architectural, traffic surveying and other necessary expenses. Such bonds shall be negotiable bonds of the commission, the income of which shall be tax free. The principal and interest of the bonds, and any premiums to be paid for their retirement before maturity, shall be paid solely from the revenue derived from the bridge and ferries;

"7. To perform all other necessary and incidental functions."

The commission has the powers as enumerated above to incur indebtedness to cover operating and construction expenses.

The express provision that the Commission may issue bonds to borrow money sufficient to cover all authorized expenditures would reasonably exclude borrowing money in any other manner. It is probable that it would be unable to do so, since it could not pledge the credit of either of the states and all the net revenue of the Commission will be pledged under the bond issue. While the Commission must incur some obligations preliminarily to the issuance and sale of the bonds, which can be paid out of the proceeds of the bonds, it is not aurhorized to borrow money or to issue or execute anything in the nature of a promissory note.

4. Your fourth question reads: Should any or all money collected from earnings, bonds sold or notes negotiated, be paid to the State Department of Revenue to the credit of the Tennessee-Missouri Commission bridge fund?"

The money collected from such sources should not be paid either to the Missouri State Department of Revenue or to the comparable Department of the State of Tennessee, but should be held by the commission in its own name to be disposed of as pledged by the compact between the states.

Article III, Sec. 36, of the Missouri Constitution provides:

"All revenue collected and money received by the state shall go into the treasury and the general assembly shall have no power to divert the same or to permit the withdrawal of money from the treasury, except in pursuance of appropriations

made by law. # # #".

Article IV, Sec. 15, of the Missouri Constitution provides:

"All revenue collected and moneys received by the State from any source whatsoever shall go promptly into the state treasury, and all interest, income and returns therefrom shall belong to the state. Immediately on receipt thereof the state treasurer shall deposit all moneys in the state treasury to the credit of the state in banking institutions selected by him and approved by the governor and state auditor, and he shall hold them for the benefit of the respective funds to which they belong and disburse them as provided by law. Such institutions shall give security satisfactory to the governor, state auditor and state treasurer for safekeeping and payment of the deposits on demand of the state treasurer authorized by warrants of the state auditor. No duty shall be imposed on the state treasurer by law which is not related to the receipt, custody and disbursement of state funds."

It is manifest that the sections quoted above only apply to money belonging to the state. In discussing these sections as they appear in the Constitution of 1875, the court said:

"By revenue of the state required by this section to be paid into the state treasury, is meant the current income, from whatever source derived, which is subject to appropriation for public uses, or money which the state in its sovereign capacity is authorized to receive." (State ex rel. Thompson v. Board of Regents for Northeast Missouri Teachers College (205 Mo. 57; 268 S.W. 698).

It seems clear that income from the sale of bonds or from toll charges is not income to the state subject to appropriation for public use. Rather, it represents funds pledged to the uses designated by the compact entered into by the two states and not money which the state in its sovereign capacity is authorized to receive and to appropriate for public uses.

Your fifth question reads; If the answer to question four is "yes" does the statute relating to the duties of the director in the Department of Business and Administration expressed in Laws of Mo. 1945, p. 619, Sec. 4 (c) apply?

In view of the answer to question four, this question requires no answer.

question four is "No", are we correct in assuming that the director of the Department of Business and Administration will have met the legal requirements of his duties pertaining to finances of the agency, when he has required monthly reports from the commission as to funds collected and an itemized account of expenditures in the department in accordance with duties of the director expressed in Laws of Mo. 1945, p. 619, Sec. 4 (f), said report to meet requirements and be approved by him. Provided, further, however, that the agency meets other obligations of the law applying to other divisions in the State Department of Business and Administration.

Laws of Mo. 1945, p. 618, Sec. 4 (f) provides:

"It shall be the duty of the director of the Department of Business and Administration to prepare and
submit to each regular session of the general assembly and to the governor a report of the activities
of the department, including the activities of each
division in the department, which report shall be in
lieu of any report now required by law for any department or office, the powers and duties of which
are by this act vested in a division in the department."

Since the Tennessee-Missouri Bridge Commission was assigned to the Department of Business and Administration by executive order dated July 27, 1949, pursuant to the provisions of Section 12, Article IV, of the Constitution of Missouri, 1945, the director of that department will be required to make the financial report referred to above to the general assembly and to the governor.

Senate Bill 153 of the Sixty-fifth General Assembly (Article III) requires the Tennessee-Missouri Bridge Commission to "report annually to the governor of each state, setting forth in detail the operations and transactions conducted by it pursuant to to this agreement and any legislation thereunder." It may be noted that the commission is not required by law to render such a report to the General Assembly, but only to the governor.

7. Your seventh question reads: Am I correct in the assumption that if the Tennessee Missouri Commission makes a report to each governor in accordance with Article III, Senate Bill 153 of the Sixty-fifth General Assembly, the Director of the Department of Business and Administration will also make a report of the activities of the division as a part of his duties as required in Laws of Mo. 1945, p. 618, Sec. 4 (f)?

Senate Bill 153, Article III, provides:

"The commission shall keep an accurate record of the cost of the bridge and of other expenses and of the daily revenues collected and shall report annually to the governor of each state setting forth in detail the operations and transactions conducted by it pursuant to this agreement and any legislation thereunder."

Laws of Mo. 1945, p. 618, Sec. 4 (f) provides that the director of the Department of Business and Administration shall:

"Prepare and submit to each regular session of the general assembly and to the governor a report of the activities of the department, including the activities of each division in the department, which report shall be in lieu of my report now required by law for my department or office, the powers and duties of which are by this act vested in a division in the department."

It appears from these quoted sections that both the Department of Business and Administration and the Tennessee-Misscuri Bridge Commission would be required to submit the reports referred to. It is believed that the report required from the Director of the Department of Business and Administration need not be "in detail", as is required by the report of the Commission.

8. Your eighth question reads: Will you enumerate the duties of the Director of the Department of Business and Administration pertaining to the Tennessee-Missouri Commission as required by law?

The general duties of the Director of the Department of Business and Administration are prescribed by statute. (See Laws Mo. 1945, p. 618. Sec. 14.)

Since the act creating the Tennessee-Missouri Bridge Commission does not specify any new duties to be imposed upon the Director of the Department of Business and Administration, his duties in relation to the commission are those general duties imposed by statute at the time of the creation of the commission.

CONCLUSION.

- 1. It is not necessary for the Tennessee-Missouri Bridge Commission to incorporate under the general corporation laws of Missouri in order to execute their duties.
- 2. The Tennessee-Missouri Bridge Commission may in its discretion establish and maintain an office or headquarters at the location of their choice.
- 3. The Tennessee-Missouri Bridge Commission has no power to borrow money other than by the specific method authorized by statute, i.e. by sale of bonds.
- 4. The money collected by the Tennessee-Missouri Bridge Commission from earnings, bonds sold or notes negotiated, should be held in the name of the commission, to be disposed of as provided by the compact between the states.
- Required no answer.
- 6. The Director of the Department of Business and Administration will have met the requirements of the duties imposed by Laws Mo. 1945, p. 618, Sec. 4 (f) by making the required reports.
- 7. The Department of Business and Administration will be required to submit a report of the activities of the Tennessee-Missouri Bridge Commission to the Governor and General Assembly.
- 8. The general duties of the Director of the Department of Business and Administration are enumerated in Laws Mo. 1945, p.618, Sec. 4.

Respectfully submitted,

APPROVED:

JOHN E. MILLS Assistant Attorney General

J. E. TAYLOR Attorney General

COUNTY COURT: Roads, Bridges and Schools. How funds received from federal government on account of leasing of lands acquired for flood control purposes shall be distributed by County Court.

January 17, 1949

1-20-49

Division of Resources and Development Department of Business and Administration Jefferson City, Missouri

Attention: Mr. H. H. Mobley, Director

Gentlemen:

This will acknowledge receipt of your request for an opinion from this department. For the sake of brevity we are restating your request.

You inquire if under the Flood Control acts, Public Law 761, enacted by the 76th Congress, and Public Law No. 228, enacted by the 77th Congress, wherein the Federal Government pays to the State funds to be expended as the State Legislature m may prescribe for the benefit of public schools and public roads of the county or counties in which such property is situated, does the county court have authority to apportion such moneys received from the Government under the foregoing Acts in the amounts deemed necessary by the county court, and to allocate moneys apportioned for schools' use to all the schools in the county, and not exclusively to the schools in the reservoir area which are no longer in existence.

The primary rule of statutory construction is that statutes should be construed to ascertain and give effect to the legislative intent explained therein. (See City of St. Louis v. Senter Commission Company, 85 S.W. (2nd) 21, 337 Mo. 238, also Missouri Pacific Railroad Company v. Helmerich, 12, F. (2nd) 978.)

Your request goes only to how such funds shall be distributed and expended by the county court which are received from the federal Government on account of the leasing of lands acquired by the United States for flood control purposes in this State, and not relative to funds received from the National Forestry Reserves. Section 701c-3, U. S. Code Ann. Title 33 reads:

> "75 per centum of all moneys received and deposited in the Treasury of the United States during any fiscal year on account of the leasing of lands acquired by the United States for flood-control purposes shall be paid

at the end of such year by the Secretary of the Treasury to the State in which such property is situated, to be expended as the State legislature may prescribe for the benefit of public schools and public roads of the county or counties in which such property is situated:

Provided, That when such property is situated in more than one state or county, the distributive share to each from the proceeds of such property shall be proportional to its area therein.

In determining the authority of the county court to distribute the foregoing funds; we should not confuse the law relative to the distribution of this fund with funds received from the National Forestry. Under Section 500, as amended, Title 16, U. S. Gode, Ann. and the enabling act passed by the legislature of the State of Missouri, Section 12695, R.S. No. 1939, since said Section 12695, supra, only applies to such funds the State may receive from the National Forestry Reserves.

The General Assembly of the State of Missouri passed an enabling act for the specific purpose of carrying out the foregoing provision relative to the distribution of federal funds under Section 701c-3, supra, Section 12696, R.S. Mo. 1939, reads:

"All sums of money heretofore received or that may hereafter be received from the United States, or any department thereof under an Act of Congress approved June 28, 1938, being an act providing for the payment to the several states of 25 per centum of all moneys received for leases of land situated in the various states to which the United States owns fee simple title under the Flood Control Act of May 15, 1938, as amended and supplemented, to be expended as the General Assembly may prescribe for the benefit of the public schools and public roads of the county or counties in which such government land is situated, or as provided by any Acts of Congress authorizing the distri-

bution of income or revenue from such lands owned by the United States of America or any of its departments, bureaus or commissions or any agency of the United States of America, to states or counties or as provided by any amendments to said acts, shall be expended as the county court of the county entitled to receive such funds may direct in accordance with the provisions and regulations as have been or may be in the future provided by the Acts of Congress providing for such distribution to states and counties."

Section 12678, R.S. No. 1939, merely requires the county court of each county receiving any such funds to use same for aid in maintaining schools and roads in accordance with Sections 12695 and 12696, supra, which simply means that funds received under and by virtue of Section 701c-3, supra, shall be distributed by the County court in accordance with Section 12696, supra, and those funds received under and by virtue of Section 500, supra, shall be distributed by the county court as provided by Section 12695, supra.

Therefore, it is the opinion of this department that funds received by the county court under Section 701c-3, U. S. Code Ann., Title 33, shall be apportioned by the county court to schools and roads in said county in whatever amount the county court deems advisable or necessary. Furthermore, the county court may allocate such funds designated for the use of such schools to all the schools in the county, and not exclusively to schools originally in the reservoir area, and no longer in existence.

Respectfully submitted,

APPROVED:

AUBREY R. HAMMETT, Jr., Assistant Attorney General

J. E. TAYLOR Attorney General APPROPRIATIONS: DEPT. OF RESOURCES AND DEVELOPMENT: State funds granted in aid of cities, t and counties under Laws of Mo. 1945, p. 1315, do not become fixed obligation of the state until final release by the Governor.

October 31, 1949

10/31/49

Mr. H. H. Mobley Director, Division of Resources and Development Jefferson City, Missouri



Dear Mr. Mobley:

We have your recent letter in which you request an opinion from this office. Your letter is as follows:

"Laws of Missouri, 1945, page 1315, provides that the State of Missouri may grant a sum not to exceed ten thousand dollars to a city, town or county to aid in the purchase and construction of air fields in such county or near such city and town. The statute provides that, upon the certification of any city, town or county that it is ready to proceed with the purchase or construction of said air field, the money may be allotted to said city, town or county, and that when the Department of Resources and Development has certified to the Governor that in its judgment the air field in question is desirable and that the funds proposed are adequate to complete the project, that said money so allotted shall be released.

"The question is: Is the obligation incurred within the meaning of Section 28 of Article IV of the Constitution of Missouri, 1945, when the funds are allotted or when the funds are released?" The Constitution of 1945 provides in Section 28 of Article IV:

"No money shall be withdrawn from the state treasury except by warrant drawn in accordance with an appropriation made by law, nor shall any obligation for the payment of money be incurred unless the comptroller certifies it for payment and the state auditor certifies that the expenditure is within the purpose of the appropriation and that there is in the appropriation an unencumbered balance sufficient to pay it. At the time of issuance each such certification shall be entered on the general accounting books as an encumbrance on the appropriation. No appropriation shall confer authority to incur an obligation after the termination of the fiscal period to which it relates, and every appropriation shall expire six months after the end of the period for which made."

Section 23, Article IV, Constitution of Missouri, provides, in part, as follows:

"The fiscal year of the state and all its agencies shall be the twelve months beginning on the first day of July in each year. * * * Every appropriation law shall distinctly specify the amount and purpose of the appropriation without reference to any other law to fix the amount or purpose."

Section 1, page 1315, Laws of Missouri, 1945, provides, in part, as follows:

" * * * Provided further that when any city, town or county in Missouri shall certify to the Governor that it has appropriated a specific sum for the aforesaid purpose and is ready to proceed with the purchase or construction of such air fields a like sum not exceeding ten thousand dollars (\$10,000.00) shall be alloted

to said city, town or county from the appropriation hereinafter made for such purpose, but said sum shall be released to such
city, town or county only after the Department
of Resources and Development has certified
to the Governor that in their judgment the
air field in question is desirable and in the
interest of the development of aviation and
that the funds proposed are adequate to complete the project; * * *"

The question is: When does the offer to contribute ten thousand dollars become a fixed obligation or debt of the State of Missouri, that is, does it become a debt when the first application by the city, town or county is made to the Governor, or is the debt incurred when the Department of Resources and Development has made its certification to the Governor?

The Constitution provides, supra, that no obligation shall be incurred after the termination of the fiscal period and every appropriation shall expire six months after the end of the period for which made. Thus, when the allotments for the air fields become "incurred obligations" is the vital proposition here. In passing upon a similar constitutional provision, the Supreme Court of Arkansas said in the case of Jobe v. Caldwell and Drake, 136 S.W. 967:

"In fixing the amount of an appropriation. the legislature anticipates and makes an estimate of the anount of money to become due and payable by the state during the specified fiscal period, and sets that much aside for such use during that period. Payments out of the appropriation of amounts falling due after the expiration of that fiscal period are not anticipated and included in the estimates, and cannot therefore be paid, even if the unexhausted appropriation be sufficient for that purpose. If it be conceded that counsel are correct in their contention that an appropriation continues to be available, after the expiration of the fiscal period, for the payment of obligations incurred during that period, an obligation must mature and become payable during that period, before payment can be demanded out of the appropriation. It is not sufficient that an

obligation may arise out of dealings with the state, to mature during a later fiscal period. The debt must, as already stated, mature and become payable during the fiscal period, before it can be held to come within the appropriations made for that period. In other words, a mere promise on the part of the state, within the lifetime of an appropriation, does not fall within the appropriation, unless such promise matures within that period. It is not correct to say that an amount earned under contract with the state comes within an appropriation, when the contract provides for payment after expiration of that fiscal period. # # #"

Further on this point: "Expenses are not 'incurred' during taxable year unless legal obligation to pay them has arisen." Bauer Bros. v. Commissioner, 46 Fed. (2d) 875.
"Expenses are not 'incurred' until legal obligation to pay them arises and do not accrue within taxable year unless all events determining liability occur within such year." Desco Corp. v. United States, 55 Fed. (2d) 411, 413.

Clearly, then, no debt has been incurred, nor any obligation to pay becomes fixed at that stage, or at that point, where no more has been done than the certification by a city, town or county to the Governor that said city, town or county had appropriated a specific fund for airport purposes, followed by an allotment of a specific fund from the appropriation provided by Laws of Missouri, 1945, page 1315. This is made explicit in Section 1, page 1315, supra, which states that "said sum shall be released to such city, town or county only after the Department of Resources and Development has certified to the Governor that in their judgment the air field in question is desirable."

Therefore, the state's obligation to contribute does not become a fixed debt to any city, town or county until the final certification to the Governor by the Resources Board. Thus, if this final certification for the release of the money is made after the period provided in Section 28 of Article IV, supra, the obligation is incurred too late to be paid for with money appropriated during that fiscal period. For example, if funds are appropriated for one fiscal term for the aid of certain counties, cities or towns, but the final certification to

the Governor by the Resources Board comes after that fiscal period has terminated, according to the duration of the fiscal terms set out in Section 28, said fund could not be turned over to the counties, etc., because of the language of Section 28, as follows: "No appropriation shall confer authority to incur an obligation after the termination of the fiscal period to which it relates."

Funds are set aside by the Legislature for certain contemplated air fields, but if the final certification is not made within the period provided by Section 28, said funds cannot be paid over as no debt or obligation to pay arose until after the appropriation period for which the funds were voted had expired. Thus, the funds so set aside are both unexpended and unexpendable. Said dormant funds should be paid back into the general revenue fund and a new appropriation of like amount should be made for the next fiscal term so that the cities, counties and towns for which said funds were originally set aside may now have them, as contemplated by Section 1, Laws of Missouri, 1945, supra.

CONCLUSION

It is the opinion of this office that a sum granted by the State of Missouri to a city, town or county for an air field under the provisions of Laws of Missouri, 1945, page 1315, does not become an obligation of the state within the meaning of Section 28, Article IV of the Constitution of Missouri, 1945, until such sum has been released by the Governor in the manner prescribed by Laws of Missouri, 1945, page 1315.

Respectfully submitted,

H. JACKSON DANIEL Assistant Attorney General

HJD:ml

APPROVED:

J. E. TAYLOR Attorney General

PROBATE JUDGE: Probate Judge acting as own clerk not entitled to receive compensation other than his compensation as probate judge.

November 28, 1949

Honorable John F. Moeckel Judge of Probate Court Cape Girardeau County Jackson, Missouri

11/28/49 FILED

Dear Sir:

Your recent request for an official opinion has been assigned to me to answer.

Your request is stated as follows:

"I have been requested to furnish an opinion on the following proposition:

"Section 5, Page 1515, Laws of Missouri 1945, provides for the appointment and compensation of probate clerks.

"Where a probate judge serves ex-officio as his own clerk, in the absence of a regularly appointed clerk, is such judge, as ex-officio clerk, entitled to claim payment from the county, the salary authorized to be paid a regular appointed clerk, for his services as ex-officio clerk, in addition to his regular compensation of Judge?

11 OL

"Is a Probate Judge in addition to his salary as Judge entitled to be paid a salary as exofficio clerk of his own court?"

In regard to the above we would first call your attention to the well established rule of law that before a public officer can claim compensation for public services he must first point out the specific statute authorizing the payment of such compensation. We would also call your attention to the equally well established legal principle that in case the statutes are ambiguous upon the point of compensation they are to be strictly construed against the public officer.

A restatement of these principles was made in the case of Nodaway County v. Kidder, 129 S.W. (2d) 857, 1.c. 860, where it is held:

"The general rule is that the rendition of services by a public officer is deemed to be gratitous, unless a compensation therefor is provided by statute. If the statute provides compensation in a particular mode or manner, then the officer is confined to that manner and is entitled to no other or further compensation or to any different mode of securing same. Such statutes, too must be strictly construed as against the officer. State ex rel. Evans v. Gordon, 245 Mo. 12, 28, 149 S.W. 638; King v. Riverland Levee District., 218 Mo. App. 490, 493, 279 S.W. 195, 196; State ex rel. Wedeking v. McCracken, 60 Mo. App. 650, 656.

"It is well established that a public officer claiming compensation for official duties performed must point out the statute authorizing such payment. State ex rel. Buder V. Hackman, 305 Mo. 342, 265 S.W. 532, 534; State ex rel. Linn County v. Adams, 172 Mo. 1, 7, 72 S.W. 655; Williams v. Chariton County, 85 Mo. 645."

Many other cases could be cited in support of this principle but we feel it unnecessary to do so.

From the above, therefore, we adduce that if you, serving as probate judge and receiving compensation therefor, are also entitled to receive additional compensation for serving ex officio as clerk of your court, that you must point out a statute which clearly provides that you are entitled to such additional compensation.

A thorough search of Missouri law fails to reveal a statute so providing.

Such a search does, however, reveal a number of statutes which clearly indicate the contrary, i.e., that a probate judge, serving ex officio as clerk of his court is not entitled to receive compensation for his service as clerk in addition to his compensation as probate judge.

Section 24, Article V, of the 1945 Constitution states:

"All judges shall receive as salary the total amount of their present compensation until otherwise provided by law, but no judge's salary shall be diminished during his term of office. Until the end of their present terms probate judges shall continue to receive compensation and clerk hire as now provided by law. The salaries of magistrates shall be fixed by law. No judge or magistrate shall receive any other or additional compensation for any public service, or practice law or do law business, except probate judges during their present terms. Judges may receive reasonable traveling and other expenses allowed by law. The fee of all courts, judges and magistrates shall be paid monthly into the state treasury or to the county paying their salaries."

It will be noted that the foregoing section of the Constitution provides that no judge or magistrate shall receive any other or additional compensation for any public services in addition to his salary as probate judge. We believe that this provision contemplates that probate judges are to be compensated for all services, rendered by them as public officers, by their salaries as probate judges.

Apparently with the intention of effectuating the foregoing provision of the Constitution the 1945 Legislature by Senate Bill 203 (Laws Mo. 1945, p. 763) passed the following law:

"No judge of probate shall sit in a case in which he is interested, or in which he may have been counsel, or a material witness * * nor shall the judge of such court act as deputy or clerk for any other public official or receive any compensation for any public service other than his compensation as such judge; * * *." (Underscoring ours.)

From the above we believe it to be clear that probate judges may not receive additional compensation for acting as clerks.

We may point further to Section 5, Laws 1945, page 1515, which states:

"In all counties now or hereafter having more than 30,000 inhabitants, (which Cape Girardeau County does) the probate judges shall appoint their own clerks, assistants, and stenographers, and shall determine their number and their salaries by order of record and may remove them when in the discretion of such judges it is deemed advisable. * * * * " (Underscoring ours; parenthesis ours.)

If, therefore, a probate judge acting as clerk of his court could draw compensation for acting as clerk he would, in view of the above, have to fix his own salary as such clerk, which clearly is contrary to public policy and which has never been and is not now the law in Missouri in relation to any public officer.

CONCLUSION

It is the conclusion of this department that where a probate judge serves ex officio as clerk of his court such judge, as ex officio clerk, is not entitled to compensation for his services as clerk aforesaid in addition to his salary as probate judge.

Respectfully submitted,

HUGH P. WILLIAMSON Assistant Attorney General

HPW:mw

APPROVED:

Attorney General

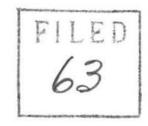
COUNTY HOSPITALS:

Bonds, sinking fund, unexpended balance remaining after creation of sinking fund to be deposited in county hospital fund.

December 7, 1949

12/9/49

Mr. Tom B. Mobley Prosecuting Attorney Dunklin County Kennett, Missouri



Dear Sir:

This is to acknowledge receipt of your letter requesting a legal opinion of this department, which request reads as follows:

"Find enclosed herewith a certified copy of the transcript of proceedings for a Hospital Bond Issue in the year of 1946 for \$350,000.00. In that year it was voted to levy a two mill tax for a period of twenty years and that County bonds should be issued in the maximum amount of \$350,000.00 to provide funds for the purchase of a site and the erection thereon of a hospital and for the support and maintenance of same.

"Since that time the assessed valuation of tangible property in Dunklin County has been raised and the two mill tax brings in more than enough to take care of the bonds and interest.

"The County Court of Dunklin County wants to know:

What the excess can be used for?

Should the entire amount collected from that tax be put into a sinking fund to retire the Bond Issue?

May the excess be held and used for maintenance after the hospital has been erected?

Can the excess be used now for building and equipping the hospital?

These further questions occurred to the Court:

Is it proper for money collected from taxes to retire the Bond Issue to be commingled with money received from the sale of bonds; or should a separate account be set up for the sinking fund to retire the bonds and all money collected from the two mill tax be placed in that sinking fund and be used only to retire the Bond Issue and pay interest on the bonds?

"You will note that the proposition to levy this tax and to issue bonds was submitted under the authority of Article 4, Chapter 126, R. S. Mo. 1939.

"Since there is a disagreement between the Hospital Board and the County Court as to how this money should be handled we would appreciate it very much if your office could render it's opinion on the questions asked at an early date."

From the facts stated in your letter it appears that the proceedings instituted for the establishment and maintenance of a public hospital in your county were begun under the provisions of Article 4, Chapter 129, R. S. Mo. 1939. Sections 15192 to 15197, inclusive, of this chapter were repealed by the Legislature in 1945 and four new sections were enacted in lieu thereof and given the same section numbers as those of the old law.

Section 15192, Laws of 1945, page 984, reads as follows:

"The county courts of the several counties of this state are hereby authorized, as provided in this Article, to establish, construct, equip, improve, extend, repair and maintain public hospitals, and may issue bonds therefor as authorized by

the general law governing the incurring of indebtedness by counties. Provided that in all cases where proceedings for the issuance of county bonds have been initiated to the extent that petitions required by existing law have been circulated and filed with the county court containing the signatures of the requisite number of qualified petitioners and an order by the county court has been made pursuant thereto calling an election and fixing the date thereof under any statute repealed hereby, such election shall be held and the results thereof canvassed and certified pursuant to the statutes under which such proceedings were initiated, and if twothirds of the qualified voters of the county voting thereon at such election shall vote in favor of incurring such indebtedness and of issuing bonds therefor, such bonds may be issued, sold and delivered under the provisions of the statute pursuant to which such proceedings were initiated, and such proceedings and such bonds, so issued, shall be valid; or where the issuance of such bonds has been authorized at an election held prior to the effective date of this act, such bonds may be issued, sold and delivered under the provisions of the statute pursuant to which such proceedings were initiated."

Under the provisions of this section the proceedings as to the issuing, selling and delivery of the Dunklin County hospital bonds were governed by the law pertaining to such matters at the time the proceedings were instituted, which were those of the 1939 statutes. In all other matters the provisions of the present laws pertaining to county hospitals and their operation will govern and are applicable to the facts before us.

Section 15193, R. S. Mo. 1939, the law in effect at the time the election was held reads as follows:

"The county court shall submit to the qualified electors of the county, at a regular or special election, the question whether there shall be levied upon the assessed property of such county a tax of mills on the dollar for the purchase of real estate for hospital purposes and for the construction of hospital buildings, and for the maintenance of same, or for either or all of such purposes. The ballots to be used at any election at which the hospital question is submitted, shall be printed with a statement substantially as follows: If a two-thirds majority of the votes cast at such election on the proposition so submitted shall be in favor of a mill tax for such bond issue for a public hospital and the maintenance of same, the county court shall levy the tax so authorized, which shall be collected in the same manner as other taxes are collected and credited to the 'hospital fund' and shall be paid out on the order of the hospital trustees for the purposes authorized by this article and for no other purposes whatever."

It appears that the proposition submitted to the voters was for a two mill tax for a bond issue for a public hospital which was carried by more than a two-thirds majority of those voting in the special election and was the authority under which the county court issued bonds in the sum of \$350,000. The provisions of section 15193 of the 1939 statutes required the proceeds of the collection of the tax to be placed to the credit of the hospital fund.

Under the provisions of Section 15193, Laws of 1945, the county court has the power to appoint five hospital trustees who shall hold their offices until the next following general election when their successors shall be chosen by the voters for terms of office of various lengths, as set out by the statutes.

Section 15194, Laws of 1945, among other things provides for organization of the Board of Trustees, and that the county treasurer of the county where the hospital is located shall be the treasurer of the hospital Board. The exclusive control of all money in the hospital fund is vested in the Board, including that of the purchase of site or sites, the purchase or construction of any hospital buildings, the care, custody and general supervisory control over the hospital, grounds and equipment.

While the statute provides that all money received for a county hospital shall be deposited in the county treasury to the credit of the hospital fund we are of the opinion that other laws relating to the incurring of county indebtedness, the issuing of bonds, and the method of paying off that indebtedness are applicable to a county indebtedness incurred by the issuance of bonds to build a public hospital.

Section 12, Article 10 of the Constitution of 1875, relating to the bonded indebtedness of counties and various other political subdivisions of the state provides in part as follows:

"* * * That any county, city, town, township, school district or other political corporation or subdivision of the State, incurring any indebtedness requiring the assent of the voters as aforesaid, shall before or at the time of doing so, provide for the collection of an annual tax sufficient to pay the interest on such indebtedness as it falls due, and also to constitute a sinking fund for the payment of the principal thereof, within twenty years from the time of contracting the same: * * *"

Section 3298, Laws of 1945, p. 600, relating to an annual tax and providing for a sinking fund to retire the bonded indebtedness of a county reads as follows:

"* * * The county court shall provide for the collection of an annual tax sufficient to pay the interest on such indebtedness as it falls due, and also to create a sinking fund for the payment of the principal thereof within twenty years from the date of contracting the same."

In the case of State ex rel. v. Hackmann, 275 Missouri, 1. c. 543, the Supreme Court in its opinion held that the provisions of Section 10, Article 12 of the Constitution of 1875, supra, was applicable to the county hospital statutes:

"* * There is no room for doubt in the present case, that the Legislature, in the exercise of the power devolved upon it under Section 12 of Article 10 of the Constitution, would have enacted a law for incurring an indebtedness to carry out its design of enabling counties of the State to build and maintain public hospitals, irrespective as to the sufficiency of two mills

on the dollar to furnish sufficient revenue for the indebtedness thereby incurred. And it would necessarily thwart this purpose on the part of the law-making body to hold, as insisted by respondent, that the act in question would not have been framed except for the purpose of limiting the rate of taxation to the amount therein prescribed."

In view of the foregoing it is our thought that a sinking fund to retire county hospital bonds is not only proper, but is fully authorized by the law. That a sinking fund to provide for the payment of the principal and interest on the Dunklin County hospital bonds should be set up and used for that purpose only, and that such funds should be kept separate and apart from all other accounts of the county.

Referring to the questions in the opinion request, we do not believe that the entire amount of funds realized from the annual collection of the two mill tax should be placed in the sinking fund but that it will only be necessary to place a sufficient amount of money in the sinking fund to retire the principal and interest payments on the bonds as they become due. After the deposit of such an amount in the sinking fund, it is our further thought that an unexpended balance of funds on hand whether it might have been derived from the two mill tax or the proceeds from the sale of the bonds should be deposited in the county treasury to the credit of the hospital fund. In the discretion of the hospital board the hospital fund may be used to defray the expense of erecting and equipping the hospital or to maintain the hospital after its completion. Such fund may be used for this or any other purpose for which the fund was authorized.

CONCLUSION

It is therefore the opinion of this department that constitutional and statutory provisions noted above relating to the incurring of indebtedness of a county by the issuing of bonds are fully applicable to county hospitals and that under said authority the county court has power to set up a sinking fund with which to pay the principal and interest on certain county hospital bonds of Dunklin County, Missouri. That said

fund shall be used only for this purpose and shall be kept separate and apart from all other accounts of the county. From such tax as collected there should be deposited in the sinking fund the amount determined to be sufficient, out of such collections, to meet the payment of principal and interest on said bonds. Any remaining funds from such tax may be deposited in the county treasury to the credit of the "county hospital fund" and within the discretion of the hospital board may be used for any purpose for which the hospital fund has been authorized and no other.

Respectfully submitted,

PMC:nm

PAUL N. CHITWOOD, Assistant Attorney General

APPROVED:

J. E. TAYLOR ATTORNEY GENERAL COUNTY HOSPITALS:

Interest and sinking fund of county hospital bond

issue to be kept in separate account, and all taxes

BONDS:

collected therefor to be placed in this account.

December 12, 1949

Honorable Tom B. Mobley Prosecuting Attorney Kennett, Missouri

Dear Sir:

Your recent request for an opinion from this department reads as follows:

> "Find enclosed herewith a certified copy of the transcript of proceedings in the issuance of Dunklin County Public Hospital bonds in the amount of \$200,000.00 in the year of 1949.

"This \$200,000.00 Bond Issue was voted to authorize the incurring of additional indebtedness and the issuance of additional bonds of Dunklin County in the principal amount of \$200,000.00 under the provisions of House Committee Substitute for House Bill 756 of the 63rd General Assembly approved April 10, 1946 (Laws of Missouri 1945, Page 983) to provide additional funds with which to establish, construct and equip a public hospital in said county.

"The following questions occurred to the County Court and there is a disagreement between them and the Hospital Board as to them.

"Should a separate account be maintained for the sinking fund for this particular Bond Issue and should all taxes collected for it be placed in this separate account.

"Should a separate account for the sinking fund for this 1949 Bond Issue be maintained and should it be kept separate and apart from the account for the sinking fund for the 1946 Bond Issue.

"You will note that I have separated the questtions of these two Bond Issues with the hope of presenting the problems more clearly to you." It was learned from additional sources that the 1946 bond issue mentioned above was effected following the voting upon and adoption of a proposition "for a (two) 2 mill tax for a bond issue for the public hospital and for maintenance of same." This was provided for by Section 15193, R.S. Mo. 1939, which was the applicable statute in force at that time, but which has since been repealed. After the adoption of this proposition, there were issued bonds in the principal amount and sum of \$350,000.00. Additional funds evidently were required, and the 1949 bond issue in the amount of \$200,000.00 was voted upon, authorized, and issued.

Section 15192, Laws of Missouri 1945, page 983, which authorizes the county court to establish and maintain a public hospital, reads in part as follows:

An Act approved April 5, 1946, Laws of Missouri 1945, page 597, is the general law governing the incurring of indebtedness by counties, and it was under this Act that the 1949 bonds were authorized and issued.

Section 26(f) of Article VI, Constitution of Missouri 1945, reads as follows:

"Before incurring any indebtedness every county, city, incorporated town or village, school district, or other political corporation or subdivision of the state shall provide for the collection of an annual tax on all taxable tangible property therein sufficient to pay the interest and principal of the indebtedness as they fall due, and to retire the same within twenty years from the date contracted."

This constitutional provision has also been enacted into statute. Section 3294, Laws of Missouri 1945, page 598, reads substantially the same. It was therefore necessary that an annual tax be provided for the interest and sinking fund before the 1949 bonds were issued. It is assumed that such has been done.

Section 1, of an Act approved March 7, 1946, Laws of Missouri 1945, page 1389, which is the general law relating to the proceeds and the interest and sinking funds of bonds issued by counties reads:

"When any bonds shall have been issued by any county, city, incorporated town or village, school district, or other political corporation or subdivision of the state, as provided under the constitution and laws of this State for the incurring of indebtedness or for refunding, extending, and unifying the whole or any part of their valid bonded indebtedness, the proceeds from the sale, thereof and all moneys derived by tax levy, or otherwise, for interest and sinking fund provided for the payment of such bonds, shall be kept separate and apart from all other funds of such governmental unit, so that there shall be no commingling of such funds with any other funds of such county, city, incorporated town or village, school district, or other political corporation or subdivision of the State: Provided, that in no case shall the proceeds derived from the sale of any such bonds be used for any purpose other than that for which such bonds were issued, nor shall such interest and sinking fund be used for any purpose other than to meet the interest and principal of such bonds: Provided further, that any bonds or money remaining in the interest and sinking fund of any such county, city, incorporated town or village, school district, or other political corporation or subdivision of the State, after the extinction of the indebtedness for which such bonds were issued, shall be paid into the general revenue fund of such county, city, incorporated town or village, or other political corporation or subdivision, and into the building fund of such school district."

It is therefore specifically provided that all moneys derived by tax levy for the payment of indebtedness incurred by a bond issue be kept in a separate fund and that such fund be kept separate and apart from all other county funds. Therefore, a separate account must be maintained for the interest and sinking fund for the 1949 bond issue, and all taxes collected for this fund must be placed in this account.

The 1946 and 1949 bonds were issued for substantially the same purpose, the establishment of a county hospital, which fact probably gives rise to your second question. Since the proceeds of the two bond issues are to be used for substantially the same purpose, it might be thought that there should be, or could be, a single interest and sinking fund for the two issues.

No authority can be found which provides that there be one interest and sinking fund to extinguish the indebtedness of two bond issues, even though they might be for the same purpose. We feel that as regards to the interest and sinking fund of the 1949 bond issue, the fact that the purpose for which the bonds were issued is substantially the same as that of the 1946 bond issue is immaterial. The proposition which was voted upon, approved, and which authorized the 1949 issue was separate and distinct from that authorizing the 1946 issue. The tax, the proceeds of which constitute the interest and sinking fund for the 1949 issue, was also separately provided for. It is therefore our opinion that, as provided by Section 1, Laws of Missouri 1945, page 1389, quoted above, the interest and sinking fund for the 1949 issue should be kept separate and apart from all other funds, including the interest and sinking fund for the 1946 issue, even though the purpose of the latter issue might be substantially the same as that of the 1949 issue.

CONCLUSION

It is therefore, the opinion of this department that the interest and sinking fund created to retire the indebtedness incurred as a result of the Dunklin County Public Hospital

Bond issue of the year 1949 must be maintained in a separate account, and that all taxes collected for this interest and sinking fund must be placed in this separate account. This interest and sinking fund should be kept separate and apart from that of the 1946 bond issue, even though the purpose of the 1946 bond issue was also for the establishment of a county public hospital.

Respectfully submitted,

RICHARD H. VOSS Assistant Attorney General

APPROVED:

J. E. TAYLOR Attorney General SHERIFFS: ELECTIONS:

Sheriffs of third class counties may appoint deputies to assist him in election duties. Such deputies must look to Sheriff for their compensation.

Filed: No. 64

March 24, 1949

Honorable J. P. Morgan Prosecuting Attorney Livingston County Chillicothe, Missouri



Dear Sir:

Your opinion request of March 19, 1949, reads, in part, as follows:

"I have your letter of March 16, 1949, enclosing copy of opinion dated August 26, 1947, addressed to Hon. James L. Paul, Prosecuting Attorney, McDonald County. In that opinion the writer (Hon. David Donnelly) states (P3) "When the sheriff acts in said capacity his duties have no connection with his duties in criminal matters, but are entirely a civil matter."

"The only provision I find for the appointment of deputy sheriffs in Third Class Counties is Section 13547.302 Mo. R.S.A., Laws 1945, page 1562. This section requires a finding by the Judge that the appointment of the deputy is 'necessary for the prompt and proper discharge of his duties relative to the enforcement of the criminal law of this state.' Under your ruling could the Judge approve the appointment under the last cited section, or could the sheriff appoint election deputies without the Judge's approval?

"Again quoting from Mr. Donnelly's opinion (P3)
'Said fee should be treated as an election
expense in the same manner as when constables
were in existence.' This indicates payment
should be made by the townships. Section
13547.307 Mo. R. S. A., Laws 1945, page 1563 provides 'All salaries provided in this act shall

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be paid out of the county treasury. Who would pay these election deputies and on whose order?

"Livingston County has approximately 25 voting places for our township elections. In view of Section 11494 Mo. R. S. A. would it not be necessary to have a deputy sheriff at each voting place?"

In the opinion to which you refer in your request, dated August 26, 1947, and addressed to the Honorable James L. Paul, Prosecuting Attorney of McDonald County, Missouri, it was held that the sheriff of a fourth class county is the proper officer to perform the duties relative to elections as were formerly enjoined by law on constables. It was also held that the fees collected by the sheriff in the discharge of such duties may be retained by him, such fees having accrued to his office in purely civil matters. It was further held in this opinion that these same fees are to be treated as an election expense in the same manner as when constables were in existence.

Section 1 of House Bill 362, Laws Mo. 1945, page 1079, provides that "whenever the word 'constable' appears in any statute except insofar as any such statute applies to the City of St. Louis and to counties of the first class, the same shall hereafter be deemed to refer exclusively to and to mean 'sheriff'." This section is therefore applicable to counties of the third as well as counties of the fourth class. Likewise, Section 3 of H.B. 899, Laws Mo. 1945, page 1562, provides that sheriffs of third class counties "shall retain all fees collected by him in civil matters," which provision is identical to that contained in the statute applicable to sheriffs of fourth class counties. Therefore the opinion in question is applicable to third class counties as well as those of the fourth class.

Three questions remain to be answered; is it necessary to have a deputy sheriff at each voting place, may additional deputy sheriffs be appointed to assist the sheriff in the discharge of his election duties, and what shall the compensation of such additional deputies be.

Section 11489, R. S. Mo. 1939, reads, in part, as follows:

"The sheriffs of their respective counties shall provide, at the expense of their counties, two ballot boxes for each precinct in each municipal township in said counties, and deposit the same with the constable of the proper township, whose duty it shall be to preserve the same, and have

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such boxes present at the proper time and place, at all elections in his township, for the use of the judges of the elections. * * *"

Section 11494, R. S. Mo. 1939, reads as follows:

"The constable shall attend the elections in his township, and perform such duties as are enjoined on him by law, under the direction of the judges."

Section 13399, Laws Mo. 1943, page 872, reads, in part, as follows:

"Constables shall be allowed fees for their services as follows:

* * * * * * * * * *

"For each day or part thereof required in erecting the booths, taking them down, and attending any election in his township, when required to do so by the judges of election, per day - - - - - - - - - - 3.00."

* * * * * * * * *

The substance of the duties imposed by these statutes is the supplying of the ballot boxes along with such other duties as the election judges may require, such as erecting and taking down booths. At the time when each township had a constable, he was required to attend the elections in his township and perform these duties. Section 11482, R. S. Mo. 1939, provides that the county court may divide townships into two or more election precincts. Therefore when the constable discharged his duties under Section 11494, supra, he may have had more than one voting place to attend. Now that the office of constable has been abolished and his election duties enjoined on the sheriff and his deputies, it follows that there need not be a deputy sheriff at each voting place but only such number of deputies as are needed to supply the ballot boxes to the voting places, and also erect, take down booths and perform such other duties as the election judges may require.

Should the sheriff find that he has an insufficient number of deputies to perform these election duties, the question arises as to whether he may appoint additional deputies to assist him.

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House Bill 899, Laws Mo. 1945, page 1562, provides for the salary and compensation of sheriffs of third class counties. Section 1 of this Act reads, in part, as follows:

"The sheriff in counties of the third class shall receive annually for his official services in connection with the investigation, arrest, prosecution, custody, care, feeding, commitment and transportation of persons accused of or convicted of a criminal offense, the following sums: In counties having a population of less than 7,500 the sum of \$1000; * * *"

Section 2 of House Bill 899, supra, reads, in part, as follows:

Considering only these statutes it would appear that deputies could be appointed only if necessary for the proper discharge of the sheriff's duties relative to the criminal laws of this state. This view is substantiated by Section 9 of House Bill 899, supra, which provides, that "all acts or parts of acts inconsistent with this act are hereby repealed." The election duties are, of course, purely civil matters.

However, it must be noted that Sections 1 and 2 of House Bill 899, supra, deal only with salaries to be paid sheriffs and their deputies, which salaries are given in lieu of the fees collected in criminal matters by such officers. Section 3 of this Act provides that sheriffs shall pay over to the county treasurer all fees arising in connection with criminal matters, and also expressly provides that such officers "shall retain all fees collected by him in civil matters." It is no doubt true that deputies appointed to assist in election duties could not be appointed and given compensation in the form of a salary as this

can only be done when the appointments are necessary to assist in the discharge of duties in criminal matters. Yet there is a general statute, Section 13133, R. S. Mo. 1939, which provides that "any sheriff may appoint one or more deputies, with the approbation of the judge of the circuit court." Deputies appointed under authority of this general statute would be allowed no salary compensation but would have to look to the sheriff for his compensation. The sheriff is entitled to the fee provided for in Sec. 13399, supra, which fee he can retain as it is chargeable in a civil matter.

It is a general rule of statutory construction that laws should be construed to harmonize and effect be given to each if possible. If the sheriff is to perform the election duties formerly performed by the constable and should he find it necessary to have additional deputies to perform same, he must have the power under House Bill 899, but he does have such power to appoint under the general statute, unless this latter statute is inconsistent with House Bill 899.

Section 2 of H. B. 899, provides for the appointment of deputies when the compensation to such deputy is to be in the form of a salary, which is not inconsistent with the appointment of deputies under the general statute to perform duties relating to civil matters, as in this case and where such deputy will have to look to the sheriff for his compensation. Appointment under H. B. 899 must be made necessary and relate to a proper discharge of duties in criminal matters, whereas appointment under the general statute can be made only in relation to civil duties.

As heretofore mentioned those deputies appointed to assist the sheriff in his election duties can receive no salary compensation, but must look to the sheriff for their compensation.

CONCLUSION

It is the opinion of this department that the sheriff in a county of the third class may appoint, with the approbation of the judge of the circuit court, such deputies as may be necessary to properly perform the election duties formerly enjoined by law on the office of constable. It is not necessary however that there be a deputy at each voting place. Such deputies must look to the sheriff for their compensation, and are entitled to no salary.

APPROVED:

Respectfully submitted,

J. E. TAYLOR Attorney General RICHARD H. VOSS Assistant Attorney General SECOND INJURY FUND:

WORKMEN'S COMPENSATION: The State Treasurer as Custodian of the Second Injury Fund under the Compensation Act may agree to a settlement and compromise of a claim against said fund, subject to the approval of the Commission, No Appropriation Act is necessary to appropriate the money before a payment is made out of said fund by the Custodian.

November 21, 1949

Honorable M. E. Morris State Treasurer of Missouri Jefferson City, Missouri

Dear Mr. Morris:

12/7/49 |FILED| |64 This will acknowledge your request for an opinion from this department, respecting the right the State Treasurer has, as Custodian of the Second Injury Fund under the Workmen's Compensation Act, to compromise and settle, in agreement with other parties, a claim pending before the Compensation Commission, and, in addition to the exercise of the right to compromise and settle such a claim, whether the State Treasurer may pay out of said fund, upon a warrant issued therefor, any sum, for any purpose, unless the amount of such claim should first be appropriated by the Legislature for such purpose.

Your letter requesting this opinion is as follows:

"The question has arisen of what authority, if any, the State Treasurer has under Section 3723 of the Workmen's Compensation Act of this state to participate in and effect a compromise settlement with other parties to a claim filed before the Compensation Commission against the Second Injury Fund of the Workmen's Compensation Act of which the State Treasurer is custodian under Section 3707-A, R.S. of Missouri, Laws of Missouri, 1945, pages 1998, 1999 and 2000.

"The question of what authority the State Treasurer as custodian of said fund has to settle a claim against such fund also involves the question of whether such fund should be appropriated by the legislature before the State Treasurer may pay out any of said fund upon a warrant issued therefor.

"Your opinion on the above questions is respectfully requested at your earliest convenience."

The Second Injury Fund amendment first came into the Workmen's Compensation Act as House Bill No. 226, Laws of Missouri, 1943, page 1068, which repealed and re-enacted Section 3707, Chapter 29, R.S. Mo. 1939. The Act of 1943 creating the Second Injury Fund, was itself repealed and re-enacted as Senate Bill No. 248, Laws of Missouri, 1945, page 1996. Section 3707 as so re-enacted, Laws of Missouri, 1945, pages 1998, 1999 and 2000, provides as follows:

"Section 3707. Computation of compensation for disability -- payments to the Second Injury Fund .-- (a) All cases of permanent disability where there has been previous disability shall be compensated as herein provided. Compensation shall be computed on the basis of the average annual earnings at the time of the last injury. If the condition resulting from the last injury is a permanent partial disability, there shall be deducted from the resulting condition the previous disability as it exists at the time of the last injury, and the compensation shall be paid for the difference. If the previous disability, and the last injury together result in total and permanent disability, the employer at the time of the last injury shall be liable only for the last injury considered alone and of itself: Provided, that if the compensation for which the employer at the time of last injury is liable, as herein provided, is less than the compensation provided in this act for permanent total disability then in addition to the compensation for which such employer is liable and after the completion of payment of such compensation by such employer, the employee shall be paid the remainder of the compensation that would be due for permanent total disability under Section 3706(a) R.S. Mo. 1939, out of a special fund known as the Second Injury Fund created for such purpose in the following manner:

"Every employer shall pay into the Second Injury Fund hereby created for every fatal injury by accident, on account of which death benefits would be payable under this act, but sustained by an employee having no dependents as defined by Section 3709, R.S. Mo. 1939, a lump sum of \$500, which shall be in addition to the amounts provided for burial and the expenses of the employee's last illness. Every employer in every case of total, permanent loss of the use of, one eye, one foot, one leg, one arm, or one hand, in addition to the compensation as provided for in this act shall pay into the Second Injury Fund provided for herein, the sum of one hundred dollars for the total or permanent loss of the use of any such member; provided, however, that the pay-ments herein fixed at one hundred dollars may on and after the date when payments in such amount become effective, be suspended or reduced as herein provided, but in no event shall such payments be increased to exceed one hundred dollars. Such payments shall be placed in a fund to be known as the Second Injury Fund, which fund is hereby appropriated by the Legislature, in accordance with law, exclusively for the payment of compensation as provided The State Treasurer shall be the cusherein. todian of the Second Injury Fund and said f und shall be deposited the same as are state funds and any interest accruing thereon shall be added thereto. Said fund shall be subject to audit the same as state funds and accounts and shall be protected by the general bond given by the State Treasurer.

"The Commission shall direct the distribution of said Second Injury Fund in the manner and amounts provided for in this chapter for the payment of compensation.

"Each January 1st and July 1st, after the effective date of this Act, the Commission shall determine the expenditures to be made from the said Second Injury Fund for the ensuing six months. If, upon such determination made by the Commission there shall be found to be in excess of fifty thousand dollars or more in the said special fund over and above the expenditures to be made therefrom during the ensuing six months, the Commission shall by order posted in its offices, suspend the payments as herein provided or reduce the amount payable to a

sum sufficient to maintain such fifty thousand dollars excess, and such suspension of or change in payments shall be effective with respect to accidental injuries or deaths occurring on or after the date of such order, and for such period as the Commission shall determine.

"In event a payment on account of death is or has been made by an employer under the provision of this section into the Second Injury Fund, and dependence in any degree as in this chapter provided is later proved, the State Treasurer is hereby authorized and directed to refund such deposit upon certification of the Commission of the establishment of such dependency.

"The Commission shall notify the Attorney General of all cases of the total, permanent loss of use of, one eye, one foot, one leg, one arm, or one hand and of all cases of fatal accident in which the employee shall leave surviving no person or persons conclusively presumed to be dependent as in this act provided, which are reported to the Commission, or which shall come to the knowledge of the Commission. Within the limitation period for the filing of claims as provided in this act, the Attorney General may file a claim before the Commission in the name of the Department of Revenue, and against the employer, to recover the payment required by this section or for said purpose may enter the appearance of the Department of Revenue in any pending claim within said time; Provided, that if the Commission or any party to any claim pending before the Commission shall notify the Attorney General that a question of dependency is involved, and the Attorney General shall fail to enter the appearance of the Department of Revenue therein within ten days after being so notified, any award thereafter entered in said claim, or order approving a settlement thereof, shall constitute a bar to any claim in behalf of said Second Injury Fund arising out of said death.

"In all cases in which a recovery against said Second Injury Fund is sought, the State

Treasurer as custodian thereof shall be named as a party, and shall be entitled to defend against said claim. All awards affecting said Funds and deposits therein shall be subject to the provisions of this chapter governing review and appeal.

- "(b) If more than one injury in the same employment causes concurrent temporary disabilities, compensation shall be payable only for the longest and largest paying disability.
- "(c) If more than one injury in the same employment causes concurrent and consecutive permanent partial disability, compensation payments for each subsequent disability shall not begin until the end of the compensation period of the prior disability.
- "(d) All payments made into the Second Injury Fund shall, for rate making purposes, be considered the payment of compensation."

It will thus plainly appear from the terms of said Section 3707, as amended, that every employer shall pay into the Second Injury Fund for every fatal injury by accident where death benefits would be payable under the Act, except that the fatal accident is sustained by an employee having no dependents as defined by Section 3709, R.S. Mo. 1939, a lump sum of \$500.00, in addition to the amounts provided for burial and expenses of the employee's last illness. The section provides that every employer, in case of the total, permanent loss of the use of an eye, a foot, a leg, an arm, or a hand, in addition to the compensation as provided for in the Act, shall pay into the Second Injury Fund the sum of \$100.00 for such total or permanent loss of the use of any such member.

Before the enactment of the Second Injury Fund statute compensation, in all cases of total disability arising out of and in the course of the employment by an employee was paid, temporary or for life, as the case might be, by the employer,

under the terms of Section 3606 of Chapter 29. The compensation therein provided for still is, unless there has been previous disability to bring the case within the terms of the Second Injury statute, paid solely by the employer or his insurance carrier. But under the Second Injury statute all employers whose employees suffer any of the casualties defined in sub-section (a) of Section 3707, as amended, regardless of the payment of other compensation, or the rendering of services, in the way of compensation, that must be paid to the employee, and regardless of whether such employees, or any of them, receive any compensation from the Second Injury Fund or not, must pay into the Second Injury Fund the sum fixed by said section for such casualty or death of such employees, as the case may be. The employer may never have any occasion to become directly benefited from such payment in any specific case. His payment is, for the time being, at least, helping only to pay for other employers' compensation to their employees, in cases of total, permanent disability, after the primary payments have been discharged by such employers during the period fixed by the terms of said Section 3606 for the full compliance by the employer with the last named statute. But if the contributing employer to the Second Injury Fund does have a case against the Second Injury Fund by reason of his employee suffering an injury by accident arising out of and in the course of his employment, resulting in total, permanent disability, then the other employers by their contributions of the payment as required of them by said section, to the Second Injury Fund, will, through said fund directly aid and assist the first named employer so that the last period of compensation payments, if for life, for the total, permanent disability of his employee, because paid in part out of the special Second Injury Fund to which he and others have so made payments under the statute will fall to the lot of all contributors alike. It is a system for the establishment and maintenance of, and it does establish and maintain, a fund for the security of totally disabled employees who are under the Act and who are eligible to receive compensation under the Second Injury Fund statute against any eventuality that might render the employer or the insurance carrier unable to pay continuing compensation in such cases of total. permanent disability.

This, then is the Second Injury Fund. It is a special fund, created and to be administered and disbursed for a special purpose.

We must keep in mind that this fund is contributed by private employers as required by Section 3707 from their private funds for their own use and protection and the use and protection of other employers similarily situated in discharging their several liabilities to such so disabled employees. In no sense, nor in any manner, is the fund or any part thereof a general fund paid to or maintained by any public agency of the State government, or mingled with any public monies whatsoever.

While the Legislature might have selected any other State officer to perform such duties, the section does provide that the State Treasurer shall be the Custodian of the Second Injury Fund, and requires that said fund be deposited by him the same as are State funds and any interest accruing thereon shall be added thereto. The section provides that the fund shall be subject to audit the same as State funds and accounts, and shall be protected by the general bond given by the State Treasurer. There is no provision in the statute defining the fund however, as State funds or public monies. The section then provides that the Compensation Commission shall direct the distribution of the Second Injury Fund in the manner and amounts provided for in the Workmen's Compensation chapter for the payment of compensation.

The section further provides that in the event of payment on account of death is or has been made by an employer under Section 3707 into the Second Injury Fund, and dependency, in any degree, as in Chapter 29 provided, is later proved, the State Treasurer is authorized and directed to refund such deposit upon certification of the Compensation Commission of such dependency.

The last paragraph of sub-section (a) of Section 3707, supra, further provides that in all cases where a recovery against the Second Injury Fund is sought, the State Treasurer, as Custodian thereof, shall be named as a party to such proceedings.

Said sub-section (a) of Section 3707 further provides that, as a party to any claim against the Second Injury Fund, the State Treasurer as Custodian of the fund shall be entitled to defend against such claim, and that any award affecting such fund shall be subject to the provisions of Chapter 29 governing review and appeal. It thus appears from the terms of Section 3707 that the Custodian of the fund as a party to any claim for compensation out of the fund would have, and does have, all of the rights and privileges to appear in, prosecute and defend and appeal, actions on behalf of or

against the fund, as the case may be, in like manner as any other party to any action would have under the Act, or under the code of civil procedure generally. Parties to actions at law have been defined by the text-writers and by the Courts also when the occasion has arisen to appropriately define the term. In the case of City of Springfield vs. Plummer, et al., 89 Mo. App. Rep. 515, our Springfield Court of Appeals had occasion to construe the meaning of the word, in reference to who are necessary parties to an action, with a view to determining when an action is finally adjudicated as to persons who are parties to the suit. The Court, quoting Greenleaf on Evidence, l.c. 531, and by adopting the definition there given of "parties", said:

"* * Parties are defined by Professor Greenleaf (1 Greenl. Ev., sec. 535) to be: 'All persons having a right to control the proceedings, to make defense, to produce or examine witnesses, and to appeal from the decision if an appeal lies.'"

These provisions of the different sections, including Section 3707 as amended, of Chapter 29, R.S. Mo. 1939, are conclusive, we believe, in establishing the State Treasurer as Custodian of the Second Injury Fund as a necessary and proper party to any claim whatsoever that may or might be filed on behalf of, or against, the Second Injury Fund. Such provisions so constituting the State Treasurer as a party to any such claim bring him, when made a party to any such claim, within the definition given by Mr. Greenleaf, and quoted by the Court of Appeals, supra.

Section 3724 of the Workmen's Compensaion Act provides that in every case of an accident the employer shall immediately notify the Commission, and the Commission shall forward to the employer and the employee, or his dependents, a form of agreement to pay and accept compensation for the accident as provided in Chapter 29. The section pre-supposes that a settlement of the controversy will be amicably effected between the employer and the employee without the filing of a claim, and if so, the agreement should be executed by the parties and returned to the Commission. If the Commission approves the agreement, an award of compensation shall be made in the case in accordance therewith. But, if there is a dispute on the part of the employer, and he refuses to execute such an agreement to pay compensation, then the Commission shall assist the person who claims to be entitled to compensation in filing his claim.

Sub-section (a) of said Section 3707, supra, being considered with the above recited provisions of said Section 3724 establishes the right of a claimant to file a claim, according to his rights as defined by the Workmen's Compensation Act, against the employer and against the Second Injury Fund. Thus, we have in said Section 3707 the statutory establishment of the Second Injury Fund, and in that section, along with the terms of said Section 3724, the provisions of law defining who, including the State Treasurer, as Custodian of said fund, are the necessary and proper parties to a claim against the employer and the insurer, if any, and the Second Injury Fund.

Section 3723 of Chapter 29 invites, authorizes, and approves the compromise and settlement of claims filed under said chapter. In that behalf said Section 3723 so providing, is, in part, as follows:

"Compromise settlements-how made-when valid. --Nothing in this chapter shall be construed as preventing the parties to claims hereunder from entering into voluntary agreements in settlement thereof, " " " "

Sub-section (a) of said Section 3707, declaring that the Second Injury Fund constitutes compensation and that the Commission shall direct the distribution of said Second Injury Fund in the manner and amounts provided in Chapter 29 for the payment of compensation, would bring the matter of the compromise and settlement of a claim filed against the Second Injury Fund strictly within the terms of said Section 3723 and any such claim would thereunder be the subject of compromise and settlement between the parties thereto.

Said Section 3723 expressly provides that the Commission must approve all settlements of any dispute or claim for compensation before such settlement or compromise shall become valid and binding. Said section so stating, is, in part, as follows:

"* * * nor shall any agreement of settlement or compromise of any dispute or claim for compensation under this chapter be valid until approved by the commission, * * * ."

Our Appellate Courts, both the Supreme Court and Courts of Appeals in numerous cases, in construing Section 3723 of the Act authorizing the compromise and settlement of claims for

compensation have frequently held that no final settlement of a claim under the Compensation Act shall be valid unless approved by the Commission. In the case of Harder vs. Thrift Construction Co., et al., 53 S.W. (2d) 34, the St. Louis Court of Appeals, in construing Section 3333, R.S. Mo. 1929, now our Section 3723 of the Revision of 1939, on this point, 1.c. 36, said:

"We have heretofore mentioned the fact that under the terms of section 3333, R.S. 1929 (Mo. St. Ann. sec. 3333), the settlement agreement of December 3, 1928, had no validity as a final compromise of the claim in view of the fact that it was not approved by the commission. * * * ."

The Supreme Court of Missouri, en banc, considered on certiorari, the case of State ex rel. Wors vs. Hostetter, et al., 124 S.W. (2d) 1072, on the same question. The Court, 1.c. 1079, in its opinion quotes Section 3333, R.S. Mo. 1929, and in holding that any compromise and settlement of a claim thereunder must have the approval of the Commission, 1.c. 1080, said:

"* * * Under the express terms of Section 3333 the approval of the Commission is necessary to make the settlement valid. And when so executed and approved there is no reason why it should not be the basis of a claim of res judicata or estoppel by judgment. "

Section 3723, Chapter 29, R.S. Mo.1939, formerly Section 3333, R.S. Mo. 1929, authorizing the compromise and settlement of claims under the Workmen's Compensation Act by providing that "Mothing in this chapter shall be construed as preventing the parties to claims hereunder from entering into voluntary agreements in settlement thereof" and the cases cited hereinabove, and from which excerpts of the opinions in such cases are quoted would, and does, include all compromise settlements in claims filed before the Workmen's Compensation Commission against the Second Injury Fund.

This, we believe, will answer your first question in the affirmative, that the State Treasurer of this State as Custodian of the Second Injury Fund, and as a party to any claim filed against the Second Injury Fund is authorized by the terms of Chapter 29, R.S. Mo. 1939, to participate in and effect, with the other parties to such claim, a compromise and settlement of such claim, for and on behalf of said fund, subject to the approval of the Commission.

This brings us to the consideration of the second question submitted in your letter whether the State Treasurer, as Custodian of the Second Injury Fund, has authority to pay out any of such fund on any claim for compensation, or otherwise, against the Second Injury Fund, or upon any award made by the Commission, or upon a warrant issued by the Commission and directed to the State Treasurer for the payment out of said fund any sum for any purpose authorized by said Chapter 29, including the refund of a payment, where such payment has been made by an employer on account of death, and dependency as provided in this chapter is later proved, unless and until there is an appropriation first made by the Legislature therefor. This question is to be determined by the solution of the further question, whether the Second Injury Fund is private monies or public monies, and after the application thereto of the provisions of the Constitution as construed by the decisions of our Supreme Court distinguishing between private funds which may happen to be placed in the custody of a public officer and public funds in the hands of a public officer, with respect to the necessity for an appropriation of such funds by the Legislature before such public official may pay out any of such funds. If the said Second Injury Fund is public money no part of it may be granted or paid to private individuals, under our State Constitution, for any purpose whatsoever, or under any circumstances. If the fund is public money, before any public official, charged with its safekeeping and lawful expenditure, could pay out or grant any of said funds, upon a warrant or requisition therefor, even for public purposes, an appropriation by the Legislature must be made therefor, and the Comptroller and the State Auditor must make the certificates in relation thereto, required by Section 28, Article IV of the Constitution. On the other hand, if the fund is a private fund in the hands of the State Treasurer as custodian only, such as payments by employers, as is required by Section 3707, as amended, Laws of Missouri, 1945, page 1998, into a special fund for a special purpose, such fund may lawfully be granted and paid by the State Treasurer to private individuals, when approved and directed by the Commission, as compensation or as a refund under the terms of Chapter 29, R.S. Mo. 1939, without an appropriation thereof by the Legislature, and without any action certifying or pre-approving it for payment by the Comptroller and without the State Auditor certifying that the expenditure is within the purpose of any appropriation, or that there is in any appropriation an unencumbered balance sufficient to pay it, under the powers given them and the duties resting upon them, or either, or both of them,

as defined in Sections 22 and 28 of Article IV of the Constitution of Missouri, 1945, and Section 36 and other sections of the Department of Revenue Act, Laws of Missouri, 1945, page 1429, and without any action thereon by the Division of the Budget, or the Director of Revenue, under said Section 22 of Article IV of the Constitution, even though the State Treasurer, as a public official, has been named by said Section 3707, as amended, as the Custodian of such funds, and has the funds in his hands as such Custodian,

We have proceeded in the preparation of this opinion, having due regard for the terms of the Compensation Act itself, upon the ground and belief that the purpose of the Act was, and is, for providing private compensation out of a private special fund for private individuals, and that the effect of the Act is to accomplish the payment of compensation, including payments out of the Second Injury Fund, as private funds to private individuals, and, if the occasion arises, a refund payment under Section 3707 of the Act.

In this position and belief we are supported by the statement in the title of the Workmen's Compensation Act proposing the passage of an Act and expressing the subject of the Act to be a plan providing for compensation to be paid to private individuals from funds of private individuals and we are supported also by the sections in the body of the Act requiring such compensation to be provided by employers, and also by other sections of the Act providing for the percentage of the annual earnings of an injured employee required to be paid as compensation, and other sections in the Act defining and fixing the character and nature of injuries meriting the payment of compensation, and other sections of the Act bearing upon the security of injured employees as individuals by the payment of compensation. These provisions all relate to, and create obligations between, employers and employees, as individuals, under their existing relationship of master and servant, intended to be established under the Act, with respect to the furnishing and paying of compensation by individuals to individuals. The said title of the Workmen's Compensation Act, as proposed when the Act was passed by the Legislature, Laws of Missouri, 1925, page 375, giving notice that the Act proposed the payment of private funds to private individuals as compensation, when merited under the Act is, in part, as follows:

"AN ACT to provide a system of workmen's compensation; prescribing the manner of

election and rejection of the act and the effect thereof; defining certain terms used in said act; defining the rights and liabilities of employers and employees electing to accept or reject the act, and of third persons in connection therewith, prescribing the method of payment of compensation to employees injured and disabled as a result of accidents arising out of and in the course of their employment: * * * * ."

Section 3691 of the Act, where both employer and employee have elected to accept the provisions of Chapter 29, makes the employer liable for the payment and requires him to pay compensation, irrespective of negligence, to employees for personal injury or death of the employee by accident arising out of and in the course of his employment. The entire Act contained in Chapter 29, of our Revised Statutes treats of and deals with the subject of the payment of compensation under the Act as the payment of private funds to private individuals.

The Constitution itself, the interpretations our Supreme Court has given in its decisions construing the sections of the Constitution, providing for the collection of, and defining what the Constitution means by the words "public money", and distinguishing between the necessity for an appropriation by the Legislature for the expenditure of public money, and the holdings of the Court that, under no circumstances, is it necessary that an appropriation be first had in order for a public official having custody of private funds to pay out such funds, are definite and plain, and are before us as controlling authorities. We shall here cite and quote the applicable sections of the Constitution and quote from a number of such decisions on these questions.

Provisions for collecting, preserving and the distribution of state funds, and the duties and responsibilities imposed upon public officials who are charged with such funds are defined in sections of the Constitution of this State.

Section 22 of Article IV of the Constitution of Missouri, 1945, creating the Department of Revenue, its personnel and the duties and authority of the department, reads as follows:

"The department of revenue shall be in charge of a director of revenue, and shall have divisions of collection, budget and comptroller, and other divisions as provided by law. The division of

collection shall collect all taxes,
licenses and fees payable to the state,
except that county and township collectors shall collect the state tax on tangible property until otherwise provided by
law. The division of the budget and comptroller shall assist the director of revenue
in preparing estimates and information concerning receipts and expenditures of all
state agencies as required by the governor
and general assembly. The comptroller
shall be director of the budget, and shall
preapprove all claims and accounts and certify them to the state auditor for payment."

Section 15 of Article IV of the Constitution of Missouri, 1945, respecting monies belonging to the State, is, in part, as follows:

"All revenue collected and moneys received by the state from any source whatsoever shall go promptly into the state treasury, and all interest, income and returns therefrom shall belong to the state. Immediately on receipt thereof the state treasurer shall deposit all moneys in the state treasury to the credit of the state in banking institutions selected by him and approved by the governor and state auditor, and he shall hold them for the benefit of the respective funds to which they belong and distaurse them as provided by law. * * * "

Section 36 of Article III of the Constitution of Missouri, 1945, reads in part, as follows:

"All revenue collected and money received by the state shall go into the treasury and the general assembly shall have no power to divert the same or to permit the withdrawal of money from the treasury, except in pursuance of appropriations made by law. * * * ."

Section 28 of Article IV of the Constitution of Missouri, 1945, with respect to the withdrawal of public money from the state treasury, fixing limitations on authority to incur obligations and providing for certifications

for the paying out of public money, and the availability of a balance on hand in each case of the paying out of public money to pay public obligations, by the Comptroller and State Auditor, respectively, in part, reads, as follows:

"No money shall be withdrawn from the state treasury except by warrant drawn in accordance with an appropriation made by law, nor shall any obligation for the payment of money be incurred unless the comptroller certifies it for payment and the state auditor certifies that the expenditure is within the purpose of the appropriation and that there is in the appropriation an unencumbered balance sufficient to pay it. At the time of issuance each such certification shall be entered on the general accounting books as an encumbrance on the appropriation. * * * * ."

Section 23 of Arbicle IV of the Constitution of 1945, making mandatory the specifications of an Appropriation Act reads, in part, as follows:

"* * * Every appropriation law shall distinctly specify the amount and purpose of the appropriation without reference to any other law to fix the amount or purpose."

The above recited and quoted sections of the present Constitution of this State apply and relate only to state revenue, that is, money collected and required by statute to be paid into the State Treasury from taxes, licenses and fees the State has the power to impose upon property and privileges of business subject to taxation by the State.

Referring again to said Section 3707, as amended, Laws of Missouri, 1945, page 1998, supra, we observe that said section states: "The State Treasurer shall be the custodian of the Second Injury Fund and said fund shall be deposited the same as are state funds and any interest accruing thereon shall be added thereto. Said fund shall be subject to audit the same as state funds and accounts and shall be protected by the general bond given by the State Treasurer." There is no provision or statement in said Section 3707 from which it may be implied that said fund shall be considered state money or public funds, and certainly there is no express provision to that effect.

The Supreme Court of this State has said in its decisions what is, and what is not, public money, and, as to public money, what procedure must be followed before it can be paid out. The rule seems to be that revenue and money derived by the State which the State has the right to receive from taxes and other means for State use must go into the State Treasury. The intention of the Legislature must bo the guide in determining whether a fund is a State fund, that is to say, State money or not. The most persuasive indication of the intention of the Legislature for money to be public money is the requirement that such funds must be paid into the State Treasury and not that the State Treasurer or any other public official merely is named custodian of such funds, as in this case. The Legislature must give the State Treasurer authority to receive funds as State funds and deposit them in the treasury as State funds before they can become such, and if the Legislature does not so provide, then such funds do not have to be paid into the State Treasury, nor do such funds have to be appropriated by law before they may be paid out, even to individuals. This view has been followed in the Missouri cases where the question has arisen whether certain funds should be paid into the State Treasury, and whether funds already in the State Treasury, must be appropriated by an Appropriation Act before they may be paid out.

The Supreme Court of this State had occasion in the case of State ex rel. vs. Members of Board of Police Commissioners of St. Louis, 340 Mo. 1166, to define "public funds" and to distinguish between that phrase and "private funds". The case was on appeal to the Supreme Court in mandamus from the Circuit Court of the City of St. Louis. The alternative writ was granted by the Circuit Court, and, on final hearing, was made peremptory, and the appeal followed. The subject of the case was a controversy between the St. Louis Police Relief Association and the members of the Board of Police Commissioners of St.Louis, Missouri, to compel the Board to deliver to the relief association certain monies in their possession. The question was, as said by the Court, whether the Police Relief Association was supported wholly or in part by the City or the State, or whether it was supported by private funds derived from private sources. In its decision that the funds in controversy were private funds, and not public funds, and that the association was supported by such funds and not by public funds, and, therefore, such funds were not subject to the necessity of appropriation, and in defining what are public funds, the Court, 1.c. 1174 and 1175, said:

"* * The Police Relief Association is a private corporation organized under the provisions of Section 8978, supra, and is under the control of its own members. If the funds created by Section 8979, supra, for the benefit of such association are public funds within the meaning of Section 46 of Articlel IV of the Constitution which prohibits the General Assembly from granting or authorizing the making of a grant of public money to a private corporation, then the Police Relief Association, a private corporation, would not be entitled to such funds. Section 8979 which creates the funds in question reads as follows:

"This fund shall be created in the following manner: All moneys at present remaining in the hands of any unincorporated police relief committee or association; all moneys arising from the sale of unclaimed personal property; all fines assessed against any delinquent officers by the board of police commissioners; all monthly, annual or periodical assessments of members as may be provided for by the rules of said association; all percentages of rewards allowed to member of any police force under the regulation of its department."

"Are the funds created by this section public funds within the meaning of the constitutional provision which prohibits the granting of public money to a private corporation? We think not. 50 Corpus Juris, page 854, section 40, defines public funds as follows:

"The term "public funds" means funds belonging to the state or any county or political subdivision of the state; more especially taxes, customs, moneys, etc., raised by operation of some general law, and appropriated by the government to the discharge of its obligations, or for some public or governmental purpose. . .

"The case of State ex rel. v. Olson, State Treasurer, 43 N.D. 619, 175 N.W. 714, 715, 716, defines public funds thus:

"The money referred to in said section is money belonging to the state, which has been accumulated in the treasury as public funds.

which are to be used in carrying on the state government. It means such money as is raised by taxation, or which has accumulated in the treasury by the payment of fees authorized by law to be charged for various purposes.

"The case of Ayers et al. v. Lawrence et al., 58 N.Y. 192, gives the following definition:

"!"Funds" may mean cash on hand, stocks, etc., and when "public funds" are referred to, taxes, customs, etc., appropriated by the government to the discharge of its obligations, are understood.!"

The consideration of the same question was before the Supreme Court in the case of State ex rel. vs. Stephens, State Treasurer, 136 Mo. 537. In that case money and securities were deposited with the State Treasurer, under a statute, by a bond investment company for the protection of investors dealing with such companies, with the understanding that the funds should be applied to the satisfaction of a prior mortgage on land constituting a part of the security for a note involved, and the question arose whether the money could be so paid by the State Treasurer without a warrant from the State Auditor and an appropriation of the money. The Court in commending the State Treasurer for declining to pay out the money until the controversy over the question of what authority he had as State Treasurer to pay out such fund, and in what manner he must proceed, was defined in an order by the Court, and holding that the State Treasurer had the implied power to make the agreement and to pay the money to discharge the prior mortgage without a guaranty from the State Auditor or an appropriation by the Legislature the Court, 1.c. 546, 547, said:

"It is next insisted that though respondent may hold the money as treasurer, and for the purpose of making the security good, still he can only be required to pay it out in the manner and under the restrictions of the constitution and laws of the state."

"Section 15, article 10, of the constitution requires that, 'all moneys now, or at any time hereafter, in the state treasury belonging to the state shall, immediately on receipt thereof, be deposited by the treasurer to the credit of the state for the benefit of the funds

to which they respectively belong' * * *, and 'shall be disbursed by said treasurer for the purposes of the state, according to law, upon warrants drawn by the state auditor, and not otherwise.' Section 19 of the same article provides that, 'no moneys shall ever be paid out of the treasury of this state, or any of the funds under its management, except in pursuance of an appropriation by law.' The statute contains like provisions. R.S. 1889, sec. 8662.

"It is manifest that these provisions only apply to money 'belonging to the state.' The money in question, though it was deposited with the treasurer, was for the specific purpose of making good the security intended for the protection of those dealing with bond investment companies, and was not money belonging to the state within the meaning of the Constitution. The securities, whether in money, bonds, or notes, are held by the treasurer in trust, not for the use or benefit of the state, but for the protection of those who may hold the bonds, certificates or debentures of bond investment companies which are authorized to sell such securities on the partial payment or installment plan.

"Section 4 of the act of April 21, 1893, provides for winding up the affairs of such corporations, and liquidating their debts and distributing their assets in case of a failure to comply with the requirements of the act. This is required to be done by a receiver appointed by the court. No legislative appropriation is made necessary. It is clear that the legisla ture did not intend that the money or securities deposited should be paid out or returned under the regulation required in paying out the public money. We are of the opinion, therefore, that respondent had the implied power, under the act, to make the agreement and that an appropriation or warrant of the auditor was not necessary."

The Supreme Court had before it in habeas corpus, the case of Ex parte Lucas, 160 Mo. 218. The prisoner was held in custody by the Marshal of Jackson County, Missouri, under an information filed in the Criminal Court charging him with conducting the occupation of a barber without having secured a certificate of authority so to do from the State Board of Barber Examiners, contrary to the provisions of Chapter 78, R.S. Mo. 1899. The petitioner had not been tried, the Court recited, but applied to a Judge of the Supreme Court and obtained a writ of habeas corpus. It seems from the facts of the case that the State Board of Barber Examiners had on hand funds for the administration of its office. The Court recited, 1.c. 226 of the opinion, the fourth ground urged by the prisoner for his discharge under the writ, as follows:

"* * * fourth, that the act provides that the board of examiners shall receive a compensation of three dollars a day and rail-road and traveling expenses to be paid out of any money in the hands of the treasurer of the board, and this is asserted to be in conflict with section 43, article 4 of the Constitution, which provides that all money received by the State from any source whatever shall go into the treasury of the State and shall not be drawn out except pursuant to a regular appropriation made by law."

The Court held against the position of the prisoner, saying that the money authorized to be collected by said Board of Barber Examiners was not State revenue but simply funds to make the Board of Examiners self-supporting, and as its grounds for remanding the prisoner to the custody of the Marshal, at the close of the case the Court, 1.c. 226, further said:

"The fourth contention is not well founded for the simple reason that section 43 of article 4, applies only to money provided for and received by the State. The money authorized to be collected under this act is not State revenue, but is simply a provision to make the board of examiners self-supporting."

The case of State ex rel. Thompson, State Treasurer vs. Board of Regents for Northeast Missouri State Teachers'

College, 264 S.W. 698, was before the Supreme Court on an original proceeding in mandamus at the relation of the State Treasurer, L.D. Thompson, to compel the Board of Regents for the college to pay certain money into the State Treasury under the assertion that such funds were public money or State money. The facts briefly stated were, that over a period of many years, in fact, from the beginning of the administration of the college, the Board of Regents had been allowed, without interference or question, to use certain funds, outside of appropriations by the Legislature, derived from charges of certain fees to students for junior high school, extension and other work.

Among other purposes for which the Board of Regents expended part of such funds was for fire insurance protection for the college buildings. Two of the buildings of the college with their contents and the property of the college were destroyed by fire after the insurance was effected. The policies were made payable to the Board. The premiums thereon were paid by the Board out of funds in its hands derived from the sources above named. The insurance companies carrying the insurance paid the losses incurred by reason of the fire in the sum of \$110,000.00, and an additional \$7,355.33 for damages to other buildings not destroyed. The Board then proceeded to expend a portion of the insurance returns, amounting to over \$26,000.00, for necessary repairs to the building not entirely destroyed and in books, to partially replace the library which was destroyed by the fire. The State Treasurer's position was that the said money was State money, and should be paid into the State Treasury as such, and could only be appropriated out and paid by the State Treasurer under appropriations made by law. In holding that there was no statute requiring the money to be paid into the State Treasury, in its decision the Court, 1.c. 701, said:

"In the foregoing discussion of the constitutional provision invoked by relator, we have stated generally that no statute required the payment into the state treasury of the money here in controversy, and that a statutory enactment was a prerequisite to such payment and its receipt and deposit by the treasurer to entitle it, under the Constitution, to be classified as state money. * * * ."

In basing its holding that such funds were not required to be paid into the State Treasury because they were not to be considered and classified under the Constitution

as State money, the Court in defining what is meant by "State money" 1.c. 700, said:

"* * # By revenue, whether its meaning be measured by the general or the legal lexicographer, is meant the current income of the state from whatsoever source derived which is subject to appropriation for public uses. This current income may be derived from various sources, as our numerous statutes attest, but, no matter from what source derived, if required to be paid into the treasury, it becomes revenue or state money; its classification as such being dependent upon specific legislative enactment, or, as aptly put by the respondent, state money means money the state, in its sovereign capacity, is authorized to receive, the source of its authority being the Legislature. * * . "

The Gourt concludes the opinion in holding that, because there was no express authority requiring it to be done, such funds were not required to be paid into the State Treasury as State funds, and, therefore, there was no ground upon which an Appropriation Act could be invoked, and in so holding, l.c. 701, said:

"* * * In the absence of a mandatory requirement to that effect, no duty is devolved upon such boards to thus dispose of these funds. Their duty in the premises, in the presence of that discretion with which the law has clothed them, is to expend such funds for the college, and account for same in the manner required by the plain provisions of the governing statutes."

In the case of State ex rel. vs. Hackman, State Auditor, 282 S.W. 1007, the Supreme Court had occasion to determine whether proceeds from license fees collected by the Highway Department which were paid into the State Treasury were public money, and if so, whether there must be an appropriation before they could be paid out for a printing bill charged and submitted to the State Auditor for a warrant by the relator.

The Constitution and the statutes then in force, the opinion recites, did not authorize the State Highway De-

partment to use and pay out for its support and maintenance and for its expenditures State monies derived from vehicle registration fees, license fees, or taxes upon the right of motor vehicles to use the public streets and highways of the State, where collected by the State and paid into the State Treasury, unless appropriated by statute. In pronouncing such income and money to be State funds, as constituting the character of funds which must be paid out by warrant and appropriation, under the Constitution, the Court, l.c. 1011, said:

" # # # The money out of which the highway commission is to be maintained is as much public or state revenue as any money coming into the state treasury from any source. Whether it is called motor vehicle registration fees, license fees, or a tax (all of which designations are used in section 44a of article 4 of the Constitution, vide Laws 1921, 1st Ex. Sess. p. 196), or by any other name, it is a tax levied by the state upon the right of motor vehicles to use the public streets and highways of the state. It is not only levied by the state, but is collected by it, and paid directly from the motor vehicle owners into the state treasury (Laws 1921, 1st. Ex. Sess. p. 104, Sec. 28). The state, therefor, is interested in what use is made of revenue from that source. * * * ."

In the opinion the Court defined the phrase "State revenue" by quoting from the Teachers' College case, 264 S.W., 1.c. 700, hereinabove cited and quoted in this opinion, where the Court further said, 1.c. 1011:

"The term 'state revenue' was recently defined by the court in banc in State ex rel. Thompson v. Treasurer of Teachers' College, 264 S.W. loc. cit. 700, 305 Mo. 64. In that case the court said:

"'By revenue, whether its meaning be measured by the general or the legal lexicographers, is meant the current income of the state from whatsoever source derived which is subject to appropriation for public uses. This current income may be derived from variour sources, as our numerous statutes attest, but, no matter from what source derived, if required to be paid into the treasury, it becomes revenue or state money.

"It thus appears that not only is the fund public revenue or state money, but it is public revenue of a very extraordinary kind, levied, collected, and held by the state for two specific public uses, the major use of which is the payment and retirement of state bonds."

Discussing the necessity under the Constitution for an appropriation before public money may be paid out, and having said in the opinion that the funds sought to be charged with the payment of the printing bill were public funds, and in holding that under the express terms of Section 19, Article X of the Constitution of Missouri then in force that no funds derived from such sources and collected by the Highway Commission could be paid out of the State Treasury without the same being first appropriated by the Legislature, the Court, l.c. 1013, further said:

"Section 19, Article 10, of the Constitution of Missouri, expressly provides that no money shall be paid out of the state treasury, except in pursuance of an appropriation by law. This section controls, unless modified by a later constitutional provision. It is true that section has, supra, does modify it as to the portion of the automobile license tax to be paid upon the principal and interest of said bonds, but that is the only modification, and there is nothing in section 44a which in any manner conflicts with, or prevents the provisions of, section 19, supra, from controlling with reference to all moneys paid out of the state treasury for the support and maintenance of the highway commission. It thus clearly appears that that portion of the license tax which is to be paid out of the state treasury for the expenses of maintaining the highway commission must, under the express provisions of the Constitution (section 19, supra), be first appropriated by act of the Legislature."

These cases considered the precise questions in their construction of statutes and sections of the Constitution of 1875, which are presented here for our consideration under the present Constitution. respecting the status of the Second Injury Fund in the Compensation Act, on the cuestion of the necessity of appropriations for the paying out of public money before it is paid out. These cases must control and direct the holding in this opinion that the Second Injury Fund is not public money, because there is no authority, either constitutional or statutory, defining the Second Injury Fund as public money; that the fund is not required to be deposited or paid into the State Treasury as State money but is private money for a private, specific object and purpose; and is placed in the hands of the State Treasurer as Custodian. apparently for safe-keeping and the convenience of coverage by his official bond and the auditing of the fund in like manner as is public money in his official charge required to be audited, and that the fund is not subject to appropriation before it can be paid out on warrants from the Workmen's Compensation Commission for lawful awards made by the Commission made against such funds, or upon an order for a refund under Section 3707, or a commutation of compensation by the Commission under Section 3736 of the Act.

We note in passing that the amended Second Injury Fund statute, 3707(a), Laws of Missouri, 1945, page 1998, provides that the Second Injury Fund is "appropriated by the Legislature, in accordance with law, exclusively for the payment of compensation as provided herein." We believe that that part of said Section 3707 as amended, so appropriating said fund as therein stated, is both unnecessary and futile. Such an appropriation is unnecessary because the Second Injury Fund is not public money but is, as we have seen, private money, not subject to be paid into the State Treasury as State money, and is, therefore, not subject to being appropriated as a pre-condition to its being paid out. The effort to appropriate the Second Injury Fund in said amendment serves no need and is futile, we believe, because if there were any need for an appropriation of said fund, it would fall far short of meeting the conditions required in an Appropriation Act by the terms of Section 23 of Article IV of the present Constitution of this State, which, to again quote it, reads as follows:

"Every appropriation law shall distinctly specify the amount and purpose of the appropriation without reference to any other law to fix the amount or purpose."

The attempted appropriation of the fund contained in said amendment is general in its nature. Awards made against the Second Injury Fund by the Workmen's Compensation Commission for second injuries sustained by employees arising out of and in the course of their employment for total permanent disability and orders for refunds or for commutation of compensation for 1ts payment in a lump sum under the chapter would rest, in each case, upon a separate, distinct, individual and personal claim and right to the payment of compensation out of the Second Injury Fund, and each award, or order for a refund, or commutation, in thecase of each claimant would, to comply with the terms of said Section 23, Article IV of the Constitution, have to be made separately from every other claim and award against said fund. So if an appropriation were necessary at all, there would have to be a specific one in each separate case. This, of course, would result in a confused and confusing obstruction to the administration of the Act, and render it practically unenforcible. However, regardless of the application of the terms of said Section 23 of Article IV of the Constitution, we believe it is plain that there are no grounds whatever existing upon which the Second Injury Fund, a purely private fund for private purposes, and not connected in anywise with the expenditure of public money for public purposes, is subject to an Appropriation Act.

The enactment of the amendment, Laws of Missouri, 1945, pages 1998, 1999 and 2000, popularly called the Second Injury Fund statute, is of such recent occurrence that is provisions and terms have not reached our Appellate Courts for construction. However, a case involving every element of the question here being considered as to whether the fund created for the payment of compensation under a Workmen's Compensation Act is public money, and, therefore, required to be appropriated before it can be paid to lawful claimants to the fund, was considered and decided by the Supreme Court of the State of North Dakota in the case of State ex rel. Stearns vs. Olson, State Treasurer, reported, 175 N.W. 714. This case has been heretofore noted in this opinion in citing and quoting from the case of State ex rel. Members of Board of Police Commissioners of St.Louis, 340 Mo. 1166, 1.c. 1174, 1175, where our Supreme Court in the St. Louis case defined what is public money with reference to the necessity of an Appropriation Act before it can be paid out.

The North Dakota case was a claim for compensation under their general Compensation Act and is not identified as a statute named a Second Injury Fund statute, such as ours. The North Dakota Workmen's Compensation Act requires a compensation

fund to be maintained, from which is paid all compensation, unlike our Act which requires primary compensation to be paid direct by the employer. But the conditions which existed, the provisions of the Constitution of the State of North Dakota, and the provisions of the statutes, with reference to the payment of claims against a general compensation fund under the Compensation Act in that State, and the fund being in the hands of the State Treasurer of North Dakota as custodian, in like manner as the Second Injury Fund is in the hands of the State Treasurer of this State, as custodian, makes the case similar in fact and in principle on the question we are here considering. The case is in point, in the discussion on the question, and in the holding by that Court that funds paid into the hands of a State official, as custodian for the payment of claims for compensation under a Workmen's Compensation Act, are not public funds and are not subject to an appropriation as is required by the Constitution of that State, the provisions of which are similar to our Constitution, in case of public funds before paying such awards as compensation. The case is well reasoned and is sufficient authority upon which to support our already expressed view that under our Constitution, the Missouri Supreme Court cases on the principle show. that the Second Injury Fund is not public money and is, therefore, not subject to appropriation. We cite the North Dakota case particularly because it does decide all of these issues, both there and here considered, in a Workmen's Compensation case, on a statute the same in its object and purpose as our Second Injury Fund statute.

The case arose out of an application by an employee for compensation under an award made by the North Dakota Workmen's Compensation Bureau for benefits due the employee under the Act. The claimant employee demanded payment out of the Workmen's Compensation fund of that State from the State Treasurer, who was custodian of the compensation fund, upon a voucher warrant issued to the employee by the Compensation Bureau. The State Treasurer refused payment on the ground that the fund constituted public money, and that the State Auditing Committee must first audit and the State Auditor certify the claim to the State Treasurer for payment. The employee filed his petition for mandamus to compel the State Treasurer to pay relator the amount of the voucher out of the compensation fund. The North Dakota statute creating the Workmen's Compensation fund contains, among others, the following provisions, 1.c. 716:

"# # # Section 6.

"'Every employer subject to this act shall contribute to the North Dakota Workmen's

compensation fund in proportion to the annual expenditure of money by such employer for the service of persons subject to the act.

"Section 10:

"The Workmen's Compensation Bureau shall disburse the workmen's compensation fund to such employes of employers as have paid into the said fund the premiums applicable to the classes to which they belong, who have been injured in the course of their employment, wheresoever such injuries have occurred, or to their dependents in case death has ensued, etc.

"Paragraph 3 of the same section provides that --

"The 'state treasurer shall give a separate and additional bond in such amount as may be fixed by the Governor, and with sureties to his approval, conditioned for the faithful performance of his duties as custodian of the workmen's compensation fund.

"Section 17 provides:

"The bureau 'shall have full power and authority to hear and determine all questions within its jurisdiction, and its decision thereon shall be final."

It will be thus observed that, while somewhat different language is used in the several sections quoted, in comparison, the provisions of the Workmen's Compensation Act of North Dakota creating and administering the Workmen's Compensation fund in all respects is very similar to the provisions of our Second Injury Fund amendment. In that State apparently they do not have a Second Injury Fund, separate from the general fund provided for compensation, or, at least at that time, had no such separate fund. But the fund under the North Dakota Act is a special fund from which all payments for compensation are made. The Supreme Court of North Dakota held against the contention of the State Treasurer, holding that the compensation fund was not a public fund and claims were not required to be

audited by the State Auditing Committee or certified by the Auditor before the same could be paid out of such fund, and ordered that the writ of mandamus be issued, directed to the State Treasurer as custodian of the compensation fund, commanding him to pay the claimant the sum named in the voucher warrant issued to him by the Commission. The opinion is not too lengthy, and while we shall not quote all of it, we will quote sufficient thereof to show that the case is applicable here to support this opinion in our view that the State Treasurer of this State as custodian of the Second Injury Fund may pay all lawful claims certified to him by the Workmen's Compensation Commission out of said Second Injury Fund without first having the same appropriated by any act of the Legislature, and without any action thereon by the Comptroller or any other State officer. The opinion in the North Dakota case deciding such points, 1.c. 716, 717, is, in part, as follows:

> " * * It would seem that the act creating the workmen's compensation fund is so very specific and clear upon the issues involved in the application for the writ that a construction of the same in this regard would be superfluous. It is perfectly clear that the workmen's compensation fund is no part of the state fund, and is, in no sense, public money. It is a special fund, accumulated by the collection of annual premiums from employers, the amount of which is determined and fixed by the Workmen's Compensation Bureau for the employment or occupation operated by such employer, and determined further by the classification rules and rates made and published by the bureau. When the fund is accumulated, the state treasury is, by the provisions of the act, made the custodian of it. The Legislature, if it had thought it wise, could have designated the Commissioner of Agriculture and Labor or the Commissioner of Insurance, or other public officer, as custodian of the fund. It might, perhaps, if it deemed it wise, have designated a trust company or responsible banking institution, or any other responsible financial agency within the state as custodian; this upon the grounds that such funds are not public funds. but is a special fund, and in a sense a private fund as contradistinguished from a public fund in the sense that it is collected from

not all the people of the state by way of taxation, but from certain individuals, corporations, associations, etc., of the state engaged in conducting certain occupations and employments denominated in the act. The purpose of the collection of the same into a special fund is to compensate for a definite length of time, depending on the character of the injury, employes who received injuries while engaged in such employment for employers who have paid the premiums assessed against them into such fund.

"The Workmen's Compensation Fund is a special fund, and is not a state fund. Hence the Legislature had the authority to designate such public officials as to it seemed proper, and impose upon them the duty of disbursing such fund in accordance with the provisions of the law, and had authority to prescribe the manner of the disbursement, as by vouchers, warrant, etc. The fund not being a public one, the state auditor would have not authority to draw warrants thereon, unless specifically authorized so to do by the law under the provisions of which the fund is a ccumulated; the manner of disbursing the fund is specifically provided for in paragraph 1 of section 13 of the act, which is above set forth. The Legislature had authority to provide for the disbursement of the fund in that manner, and the same is neither illegal nor unconstitutional. * * * .

The facts and principles discussed and determined in the above cited cases, the terms of the Second Injury Fund statute, Section 3707 itself, and the provisions of the Constitution, as applied to the provisions of the Second Injury Fund, require us to say that the Second Injury Fund of the Workmen's Compensation Act is not State money; that the State Treasurer as Custodian of the Second Injury Fund may participate with other parties to a lawful claim against such fund, pending before the Workmen's Compensation Commission, and recommend to and advise the Commission, in the interest of said fund, to make an order for the approval of a compromise and settlement of any such claim; that no appropriation of any sum paid out or to be

paid out for compensation under the Act, generally, or under the provisions of the Second Injury Fund statute, Section 3707, or upon the commutation of any such compensation by the Commission under the provisions of Section 3736 cr the Act, or upon any refund necessary under said Section 3707 of said Act, upon the order of the Compensation Commission by the State Treasurer as Custodian of said fund is necessary, nor is it required that the Comptroller of the Department of Revenue or any other State official approve or certify for payment any such amounts or claims, or participate in the payment of sums out of said fund as a condition precedent to the payment thereof or any part thereof by the said custodian, in any way whatsoever.

CONCLUSION.

It is, therefore, the opinion of this department, considering the above cited and quoted authorities,

- 1) That the State Treasurer of Missouri as Custodian of the Second Injury Fund, as a party to a claim pending before the Workmen's Compensation Commission, is authorized by the terms of Chapter 29, R.S. Mo. 1939, to participate in and effect an agreement with the other parties to such claim for a compromise and settlement of such claim, subject to the approval of the Workmen's Compensation Commission.
- 2) That because the fund is not public money but is a private fund, no Appropriation Act is necessary or permissible to appropriate any sum paid out, or to be paid out of the Second Injury Fund by the State Treasurer as Custodian of the fund for compensation under the Workmen's Compensation Act, or for any other lawful purpose under the Act, pursuant to the order and requisition of the Workmen's Compensation Commission therefor, nor is it necessary or permissible that the Comptroller of the Department of Revenue, the State Auditor, the Governor, or any other State official approve, set aside, release, or certify for payment any such sum or sums, or that any such officer participate in any steps looking toward the payment thereof, as a condition precedent to the payment thereof or any part thereof out of said Second Injury Fund by said Custodian, in any manner whatsoever.

Respectfully submitted,

APPROVED:

GEORGE W. CROWLEY Assistant Attorney General

J. E. TAYLOR Attorney General GWC:ir STATE TREASURER:

May accept payments from estate of Rosa Ruhland to be credited to Federal Soldiers' Home Fund. Memorial fund not to be established therefor.

November 30, 1949

12/8/49

84ED

Honorable M. E. Morris State Treasurer Capitol Building Jefferson City, Missouri

> Attention: Haskell Holman Chief Clerk

Dear Sir:

This will acknowledge receipt of your letter dated October 25, 1949, requesting an opinion in the following terms:

"It is requested that you furnish this Department with a written opinion stating whether or not the State Treasurer should accept payments in favor of the State Federal Soldiers' Home in the case of the estate of Rosa Ruhland.

"Also, please advise whether or not these can be placed in a special fund called the Rosa Ruhland Memorial Fund."

Express statutory provisions contemplate the receipt of private gifts of money and property for the use of the Federal Soldiers' Home. Your attention is directed to 1939 Mo. R.S. Section 1513, which provides:

In interpreting this section the Supreme Court of Missouri held in the case of Mississippi Valley Trust Co., v. Ruhland 222 S.W. (2d) 750:

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"This amendment, as well as other similar enactments with respect to other state agencies, was in affirmance of the common law, as developed hereinbefore; and so far as the capacity of the state to accept testamentary gifts is involved, was declaratory thereof and more clearly established the common law as being in force and effect."

Mo. R.S. 15137 expressly requires the trustees of said Home to periodically report under oath giving a detailed statement of all moneys and other property received on account of such home; and further requires said trustees:

"* * to immediately transmit to the state treasurer all moneys received by them, or by any financial officer of the institution, from whatsoever source, except (not material here), and the state treasurer shall, on receipt of said moneys credit the same to the Federal Soldiers' Home Fund, which is hereby created and established."

Article IV, Section 15, of the Constitution of Missouri provides:

"All revenue collected and money received by the state from any source whatsoever shall go promptly into the state treasury, and all interest, income and returns therefrom shall belong to the state. Immediately on receipt thereof the state treasurer shall deposit all moneys in the state treasury, * * * and he shall hold them for the benefit of the respective funds to which they belong and disburse them as provided by law."

It would seem clear from the foregoing statutes that the state treasurer is authorized to receive funds, for the

Hon. M. E. Morris

use and benefit of the Federal Soldiers' Home located at St. James, Missouri, and shall credit the same to the Federal Soldiers' Home fund as provided by Section 15137.

Of course, it may also be pointed out that for bookkeeping purposes the source of this revenue from the estate of Rosa Ruhland s ould be indicated in the Federal Soldiers' Home fund. The state treasurer would not be authorized to create a special fund called the "Rosa Ruhland Memorial Fund", but money received from the estate would be placed in the Federal Soldiers! Home fund.

CONCLUSION.

Therefore, this department is of the opinion that the State Treasurer should accept payments in favor of the Federal Soldiers' Home in the case of the estate of Rosa Ruhland. Such payments should be credited to the Federal Soldiers' Home Fund, and a separate memorial fund should not be established therefor.

Respectfully submitted,

JOHN E. MILLS Assistant Attorney General

APPROVED:

J. E. TAYLOR Attorney General

JEM: 1d

MOTOR VEHICLES: Jurisdiction of Commissioner suspended during pendency of appeal from order cancelling, suspending or revoking driver's license. Further orders during this time

March 16, 1949

3.21

FILED 65

Honorable Walter L. Mulvania Prosecuting Attorney of Atchison County Rock Port, Missouri

Dear Mr. Mulvania:

This is in reply to the letter of recent date under the signature of yourself and Honorable S. F. Wier, Judge of the Magistrate Court of Atchison County, requesting the opinion of this department on the following question:

"Does the Supervisor of the Driver's License Registration of the Department of Revenue have the right to reinstate a suspended Driver's License before the matter has been determined by the Circuit Court in an appeal taken in the case under the provision of Section 8463 of the Revised Statutes of Missouri?"

The procedure by which an appeal may be taken from the order of the Commissioner of Motor Vehicles cancelling, suspending or revoking a driver's license is provided in Section 8463, Revised Statutes of Missouri, 1939. It is provided in said section that such appeal be taken to the Circuit Court in the county wherein the person affected resides.

The statutes are silent on the particular question under consideration. Further, we find no Missouri cases wherein this point is expressly decided. However, we submit that this matter is analogous with the ordinary appeals in courts of law and that the principles governing such appeals are applicable. On this point we cite \$\psi_2\$ Am. Jur., "Public Administrative Law", Pages 577 and 578, Section 238, which is in part as follows:

"Depending upon the method in which relief from or review of administrative action is sought, the practice and procedure may be governed by the principles governing ordinary actions at law or in equity, by the principles governing an ordinary appeal, or by particular statutory rules provided by the statutes governing review of the acts of individual agencies." * * *

The inferring of jurisdiction in case of appeal to the appellate court gives to the appellate court the exclusive power and authority over the subject matter of the appellate proceeding, and the authority of the lower court is suspended. The lower courts can not proceed in any manner so as to affect the jurisdiction acquired by the appellate court. The Supreme Court of Missouri in the case of State ex rel Callahan et al v. Hess, 153 S. W. (2nd) 713, sets out the rule on page 715 as follows:

"The rule invoked by relators is that an appeal divests the jurisdiction of the trial court and places it in the appellate court, and during the pendency thereof the court from which the appeal has been allowed has no power to render further decisions affecting the rights of the parties until the case has been remanded. Such is undoubtedly the general rule. State ex rel v. Sale, 153 Mo. App. 273, 133 S. W. 119; 2 Ency. of Pl. & Pr. 327; Foster's Adm'r v. Rucker's Ex'r, 26 Mo. 494; Ryans v. Boogher, 169 Mo. 673, 69 S. W. 1048."

This statement of the law is also found in State ex rel St. Charles Savings Bank vs. Hall, 12 S. W. (2nd) 91, 1. c. page 94, as follows:

"The judgment in the main case, to which it is said the injunction was an incident, was rendered at the February term, 1927, of the circuit court of the City of St. Louis, and the appeal was granted at that same term. Jurisdiction of such main case was thereby transferred to the Supreme Court, and the circuit court of the city of St. Louis thereupon parted with every vestige of jurisdiction it theretofore had over said case."

Further in Case vs. Smith, 257 S. W. 148, the Kansas City Court of Appeals made the following statement on Page 150:

"It is well settled that after an appeal has been allowed, the court from which the appeal has been allowed has no power to render further decision affecting the rights of the parties until the case has been remanded."

See also: Foster's Adm's v. Rucker's Ex'r, 26 Mo. 494, 1. c. 495; Harris et al vs. Chitwood, 210 Mo. 560, 1. c. 561. While no Missouri cases involving administrative tribunals have been found on this point we cite two Texas cases in support of our conclusion. In 1936 the court of civil appeals of Texas ruled that the Public Service Commission loses jurisdiction over an order thereof when attacked by appeal to the District Court and is without authority to take any action thereon while such suit is pending. Railroad Commission of Texas vs. North Texas Coach Company, 92 S. W. (2nd) 268. Later in 1945 the same court held in the case of Chenoweth vs. Railroad Commission, 184 S. W. (2nd) 711, that when a suit is brought to test the validity of the Railroad Commission's order the Commission loses jurisdiction over the subject matter of the order during the pendency of the suit.

In view of the foregoing we believe that Section 8463, supra, in providing that when a person appealing files a petition for a hearing in the circuit court in the county wherein such person resides "such court is hereby vested with jurisdiction" can only mean that such circuit court has sole jurisdiction in the matter until a decision is reached on said appeal. We must give effect to this provision. Any other construction would nullify the intent and purpose of the statute. The Commissioner should proceed no further, but await the action of the court.

Generally, unauthorized proceedings in a lower court after jurisdiction has been acquired by the appellate court on appeal, are held to be void. This rule is recognized by the Supreme Court of Missouri in the case of Niedringhaus et al vs. Wm. Niedringhaus Insurance Company et al, 46 S. W. (2nd) 838, 1. c. 843; and further by the St. Louis Court of Appeals in Schramm vs. Kraeuchi et al, 156 S. W. (2nd) 374, where it was said at pages 375 and 376:

"We have no record before us here to show what proceedings were had in the cause in the court below subsequent to the granting of the appeal. and we do not see how such subsequent proceedings could be properly brought before us for review on this appeal. It would seem that our disposal of the appeal must be made in view of the status of the cause as it existed at the time of the granting of the appeal. Subsequent proceedings in the court below cannot be permitted to interfere with such disposal of the appeal as this court may deem just and proper. If the court below, subsequent to the granting of the appeal, entered any judgment or order, which, being permitted to stand, would preclude a proper disposal of the matter involved in the appeal as directed by this court, then such judgment or order is a nullity for want of jurisdiction, and must necessarily be set aside by the court below merely for the asking."

In view of these decisions we believe that further orders of the Commissioner, after an appeal has been taken, which interfere with the disposal of such appeal by the court are void.

CONCLUSION

Therefore, it is the opinion of this department that when an appeal is taken to the circuit court from an order of the Commissioner of Motor Vehicles as provided in Section 8463, Revised Statutes of Missouri, 1939, the jurisdiction of said Commissioner is suspended and he is without authority to take further action while such appeal is pending. It is also the opinion of this department that further orders of said Commissioner during the pendency of such appeal are void and of no effect.

Respectfully submitted,

DAVID DONNELLY ASSISTANT ATTORNEY GENERAL

APPROVED:

J. E. TAYLOR ATTORNEY GENERAL DIVISION OF MENTAL DISEASES: CONTRACT WITH MUNICIPALITY FOR HOSPITAL FACILITIES AND SERVICES: (1) The Division of Mental Diseases cannot enter into a contract with the Board of Education to furnish teaching services for the St. Louis State Training School. (2) Said Division cannot enter into contract with the City of St. Louis, a municipal corporation for services of interns and resident physicians of the St. Louis City Hospital to be rendered to the St. Louis State Hospital.

May 27, 1949

Dr. Orr Mullinax, Director Division of Mental Diseases State of Missouri Department of Public Health and Welfare State Office Building Jefferson City, Missouri



Dear Dr. Mullinax:

This will acknowledge receipt of your letter requesting an opinion of this department. Your letter is as follows:

"In connection with the operation by the state of the St. Louis State Training School and the St. Louis State Hospital newly acquired by deed from the City of St. Louis, it seems that it will be to the advantage of both institutions for us to enter into certain contracts with the Board of Education of the City of St. Louis and the City of St. Louis itself for certain services to be rendered to these institutions.

"Specifically, (1) the Board of Education has heretofore furnished the teachers for the St. Louis Training School which is the same institution as the present St. Louis State Training School now owned by the State of Missouri and operated by the Division of Mental Diseases under the supervision of the Department of Public Health and Welfare. These teachers, however, will lose certain rights now enjoyed by them under and by virtue of the school laws of the state if they separate themselves from the Department of Education of the City of St. Louis and they are consequently refusing to do so. The said Board of Education has heretofore been furnishing the said school with certain equipment essential to the operation of the school, which equipment it is apparently about to remove from the school. (2) For the course of

the operation of the St. Louis City Sanitarium, now known as the St. Louis State Hospital, certain laboratory and post-mortem services essential to the operation of the hospital were furnished by the City of St. Louis which services are not now available to the St. Louis State Hospital. (3) Heretofore in the course of the operation of the St. Louis City Sanitarium the Hospital Division of the City of St. Louis supplied to it the services of certain interns and resident physicians of the St. Louis City hospital. The services of these interns and resident physicians would greatly facilitate the efficiency of the St. Louis State Hospital but at present are not available to the institution.

"With the foregoing facts in mind, we desire and request an official opinion from you as to whether or not in view of Section 7403, Laws of Missouri, 1947, or any other law or statute, the Division of Mental Diseases of the Department of Public Health and Welfare can enter into the following contracts:

- "(1) A contract with the Board of Education of the City of St. Louis to furnish the services of teachers to the St. Louis State Training School, said teachers to be under the joint contract and supervision of the said Board of Education and the Division of Mental Diseases of the Department of Public Health and Welfare and can such teachers if so furnished by said board and under its control be exempt from the provisions of the State Merit system Act and can such contract include the furnishing by said board of the equipment essential to the operation of the school?
- "(2) Can the Division of Mental Diseases contract with the City of St. Louis for the furnishing of such laboratory and post-mortem services as said City has heretofore furnished the St. Louis City Sanitarium?
- "(3) Can the Division of Mental Diseases contract with the City of St. Louis for the services of interns and resident physicians of the City Hospital of the City of St. Louis?

"If these contracts can be entered into by the Divi-

sion of Mental Diseases it will greatly simplify the problems arising out of the operation of these institutions."

Your above quoted letter makes it clear that the St. Louis State Training School now operated by the State of Missouri through your division was recently owned and operated by the City of St. Louis, and that when so owned and operated, the school used teachers and equipment furnished by the Board of Education of the City of St. Louis, and that the St. Louis State Hospital now owned and operated by the State, through your department, when owned and operated by the City of St. Louis, used certain laboratory facilities of the St. Louis City Hospital, and also availed itself of the services of interns and resident physicians of said hospital.

You desire an opinion as to whether it is possible under the law for your division to contract with the City of St. Louis, a municipal corporation, with a view to procuring a continued use by the St. Louis State Hospital of these facilities and services, and to contract with the Board of Education of the School District of the City of St. Louis for the furnishing of teachers and facilities to the St. Louis State Training School.

Section 7403 (b), Laws of Missouri, 1947, page 402, cited by your department in the opinion request reads as follows:

"Any municipality or political subdivision of this state, as herein defined, may contract and cooperate with any other municipality or political subdivision or with an elective or appointive official thereof, or with a duly authorized agency of the United States, or of this state, * * * for the * * * operation of any * * facility; or for a common service; provided, that the subject and purpose of any such contract or cooperative action made and entered into by such municipality or political subdivision, shall be within the scope of the powers of such municipality or political subdivisions. If such contract or cooperative action shall be entered into between a municipality or political subdivision, such contract or cooperative action must be approved by the governing body of the unit of government in which such elective or appointive official resides." (Underscoring ours.)

Section 7403 (a), Laws of Missouri 1947, page 402, declares

that the term "Political Subdivision" for purposes of the Act includes cities and school districts. We are therefore of the opinion that this includes both the City of St. Louis and the St. Louis School District represented by the Board of Education of the City of St. Louis. Having established the general proposition that your division may contract with political subdivisions of the State such as the City of St. Louis and the St. Louis Board of Education, we must next consider the question as to whether it can enter into a valid contract with the City of St. Louis and the Board of Education of St. Louis for the services of certain employees of these two political subdivisions.

We are of the opinion that this cannot be done, and we believe that this is true for the reason that as heretofore said by the Supreme Court of Missouri in Springfield vs. Clouse, 206 S.W. (2nd) 539:

"* * The whole matter of qualifications, tenure, compensation and working conditions for any public service involves the exercise of legislative powers."

The following is a rather extensive quotation from the Supreme Court opinion last cited:

"* * * Under our form of government, public office or employment never has been and cannot become a matter of bargaining and contract. State ex rel. Rothrum v. Darby, 345 Mo. 1002, 137 S.W. 2nd 532; see also Nutter v. City of Santa Monica, 74 Cal. App. 2nd 292, 168 P. 2nd. 741, loc.cit. 745; Miami Water Works Local No. 654 v. City of Miami, 157 Fla. 445, 26 So. 2nd 194, loc.cit. 197, 165 A.L.R. 967; Mugford v. Mayor and City Council of Baltimore, 185 Md. 266, 44 A.2d 745, loc.cit. 747, 162 A.L.R. 1101. This is true because the whole matter of qualifications, tenure, compensation and working conditions for any public service, involves the exercise of legislative powers. Except to the extent that all the people have themselves settled any of these matters by writing them into the Constitution, they must be determined by their chosen representatives who constitute the legislative body. It is a familiar principal of constitutional law that the legislature cannot delegate its legislative powers and any attempted delegation thereof is void. 11 Am. Jur. 921, Sec. 214; 16 C.J.S. Constitutional Law, 133; A.L.A.

We are, therefore, of the opinion that since the whole matter of personal services and all matters pertaining thereto are particularly within the jurisdiction of the legislature to be administered by the administrative branch of the Government in strict accordance with legislative enactments, it would be impossible for the administrative branch of Government without specific authority from the legislature embodied in some statute to delegate the matter of control of such personal services by entering into a contract whereby it is provided that work within the peculiar province of either contracting party shall be done by the employees of the other contracting party.

CONCLUSION

We are, therefore, of the opinion that you cannot enter into a contract with the City of St. Louis whereby it is agreed that the services of doctors and interns employed by the City Hospital of the City of St. Louis shall be made available to your division in the performance of the duties to be performed by the St. Louis State Hospital, and we are of the further opinion that you cannot contract with the Board of Education of the City of St. Louis to furnish teachers and teaching services in the St. Louis Training School, a State Institution.

Respectfully submitted,

APPROVED:

J. E. TAYLOR Attorney General SAMUEL M. WATSON Assistant Attorney General

SMW:p

RECORDERS: Recorders allowed additional fee only when certified copy

VETERANS: of discharge is furnished upon request.

June 13, 1949

Mr. Walter L. Mulvania Prosecuting Attorney Atchison County Rock Port, Missouri FILED 63

Dear Sir:

This department is in receipt of your recent letter requesting an opinion regarding the construction to be given Section 6a, Laws Missouri 1947, Volume 2, Page 360. Your request reads, in part, as follows:

"The question is whether the recorder is entitled to be paid immediately the sum of fifty cents for each name which the recorder shall append to the alphabetical list and also fifty cents for every certified copy of the discharge made, whether or not requested, to be paid out of the county treasury, or whether the recorder is entitled to the additional fifty cents for the certified copy only when it is furnished upon request.

Section 6a, supra, reads as follows:

"The circuit clerk and recorder in counties of the Third Class, wherein the offices shall have been combined, as recorder of the county, shall in addition to other duties imposed upon him by law have the additional responsibility to prepare and keep a separate alphabetical list of the names of all residents of the county who have been discharged from the Armed Forces of the United States, which list shall show such veterans' name, post office address, and the branch of service from which he was discharged, the date of his discharge and the date of the recording of same, together with the book and page wherein such discharge is so

recorded, which list shall be maintained by the recorder for public inspection and shall be up to date at all times; and in addition thereto, said recorders in the said counties shall have the additional responsibility of furnishing to all persons who have so reported their discharge from the Armed Forces of the United States one certified copy of such discharge upon request . of such veteran, or if such veteran shall have deceased since the recording thereof, then by his heir. executor or administrator. For each name which the recorder shall append to the aforesaid alphabetical list, and for each certified copy of such discharge as he shall furnish, the said recorder shall receive the sum of fifty cents, to be paid out of the county treasury, which fees shall not be deemed to be accountable fees within the meaning of Section 3 of this act: Provided, however, that no such recorder shall be paid for the listing of any nonresident of the county, nor for the listing of any such discharge which has previously been so listed in any county, nor for any additional varified copy after the first. veteran shall be deemed a resident of the county for the purposes of this section if he shall have resided in the county prior to his induction into the Armed Forces, and shall have returned there upon his discharge, or if he shall have resided in the county for more than ninety days next prior to the recording of such discharge with the intention of making the county his domicile."

This statute provides that the recorder shall be allowed a fee of fifty cents to be paid out of the county treasury for each name which he shall append to the alphabetical list. It is also made the duty of the recorder to furnish to all persons reporting their discharge one certified copy of such discharge upon request of the veteran, or his heir, executor or administrator. The statute also provides for an additional fee of fifty cents payable out of the county treasury "for each certified copy of such discharge as he shall furnish." The question presented is whether the recorder is entitled to this additional fee for every certified copy made by him or only for every certified copy furnished upon request.

It must be remembered that statutes which provide for compensation to public officers must be strictly construed against such officers (See Nodaway County v. Kidder, 123 S.W.(2d) 857, 344 Mo.

Under the statute in question it is not made the duty of the recorder to prepare certified copies of all the discharges recorded by him; the duty to prepare and furnish such certified copies arises only upon the request of the veteran, or if such veteran shall have deceased since the recording thereof, then by his heir, executor or administrator. Furthermore, the statute does not allow the fee for the making or preparing of such certified copy but states that it shall be allowed the recorder "for each certified copy of such discharge as he shall furnish." Therefore, since it is not the duty of the recorder to prepare and furnish the certified copies until requested to do so, and since the statute expressly provides that he shall be entitled to the fee for each certified copy furnished, it follows that he is entitled to the additional fee only when such certified copy is furnished on request.

CONCLUSION

Therefore, it is the opinion of this department that the circuit clerk and recorder in third class counties wherein the offices have been combined, as recorder of the county, is allowed the additional fee of fifty cents payable out of the county treasury for the making and furnishing of a certified copy of a veteran's discharge from the Armed Forces of the United States only when such certified copy is furnished upon request. He is not entitled to this additional fee for the mere making of a certified copy of each recorded discharge.

Respectfully submitted,

APPROVED:

RICHARD H. VOSS Assistant Attorney General

J. E. TAYLOR Attorney General

RHV:mw

HIGHWAY COMMISSION: Legislature may not limit expenditure from state road fund.

January 18, 1949

Hon. John W. Noble Kennett, Missouri



Dear Sir:

We have received your request for an opinion of this department, which request is as follows:

"Article 4, section 29, Missouri Constitution, 1945, provides that the Highway Commission 'shall have authority over and power to locate, relocate, design and maintain all state highways; and authority to construct and reconstruct state highways, subject to limitation and conditions imposed by law as to the manner and means of exercising such authority,' etc.

"Please furnish me with your opinion whether this or any other provision of the Constitution authorizes the legislature to earmark any additional gas tax increase specifying that a part of such increase shall be used for farm road improvement or supplementary road building.

"It has been somewhat accepted belief that the highway funds are to be spent solely within the discretion of the Highway Commission. The purpose of this request is to determine what, if any, statutory directions can be placed by the legislature on the Commission, as to any proportion of funds to be expended on primary and secondary systems."

The Missouri State Highway Commission was originally established by an act of the Legislature in 1921 (Laws 1921, First Extra Session, page 131), following the adoption of Section 44a of Article IV of the Constitution of 1875 at the November, 1920, election (Laws 1921, page 707). That amendment authorized a sixty million dollar bond issue for the construction of hard surfaced roads. The 1920 amendment specifically authorized the Legislature to enact such laws as might be necessary to carry the amendment into effect. The constitutional provision was amended in 1928 (Laws 1929, page 453), at which time an additional seventy-five million dollar bond issue was authorized and provision made for the supplementary highway system. The amendment adopted at that time again authorized the Legislature to enact such laws as might be necessary to carry the amendment into effect.

Section 29 of Article IV, Constitution of 1945, established the Highway Commission as a constitutional agency. That section reads as follows:

"The department of highways shall be in charge of a highway commission. The number, qualifications, compensation and terms of the members of the commission shall be fixed by law, and not more than one-half of its members shall be of the same political party. The selection and removal of all employees shall be without regard to political affiliation. It shall have authority over and power to locate, relocate, design and maintain all state highways; and authority to construct and reconstruct state highways, subject to limitations and conditions imposed by law as to the manner and means of exercising such authority; and authority to limit access to, from and across state highways where the public interest and safety may require, subject to such limitations and conditions as may be imposed by law."

Section 30 of Article IV, Constitution of 1945, relates to the funds of the Department of Highways, and reads as follows:

"For the purpose of constructing and maintaining an adequate system of connected state highways all state revenue derived from highway users as an incident to their use or right to use the highways of the state, including all state license fees and taxes upon motor vehicles, trailers, and motor vehicle fuels, and upon, with respect to, or on the privilege of the manufacture, receipt, storage, distribution, sale or use thereof (excepting the sales tax on motor vehicles and trailers, and all property taxes,) less the cost, (1) of collection thereof, (2) of maintaining the commission, (3) of maintaining the highway department, (4) of any workmen's compensation, (5) of the share of the highway department in any retirement program for state employees as may be provided by law, (6) and of administering and enforcing any state motor vehicle laws or traffic regulations, shall be credited to a special fund and stand appropriated without legislative action for the following purposes, and no other:

"First, to the payment of the principal and interest on any outstanding state road bonds.

"Second, any balance in excess of the amount necessary to meet the payment of the principal and interest of any state road bonds for the next succeeding twelve months shall be credited to the state road fund and shall be expended under the supervision and direction of the commission for the following purposes:

- (1) To complete and widen or otherwise improve and maintain the state system of highways heretofore designated and laid out under existing laws;
- (2) To reimburse the various counties and other political subdivisions of the state, except incorporated cities and towns, for money expended by them in the construction or acquisition of roads and bridges now or hereafter taken over by the state as permanent parts of the system of state highways, to the extent of the value to the state of such roads and bridges

at the time taken over, not exceeding in any case the amount expended by such counties and subdivisions in the construction or acquisition of such roads and bridges, except that the commission may, in its discretion, repay, or agree to repay, any cash advanced by a county or subdivision to expedite state road construction or improvement;

- (3) In the discretion of the commission to locate, re-locate, establish, acquire, construct and maintain the following:
- (a) supplementary state highways and bridges in each county of the state as hereinafter provided:
- (b) state highways and bridges in, to and through state parks, public areas and reservations, and state institutions now or hereafter established, and connect the same with the state highways; and also national, state or local parkways, travelways, or tourways, with coordinated facilities;
- (c) any tunnel or interstate bridge or part thereof, where necessary to connect the state highways of this state with those of other states;
- (d) any highway within the state when necessary to comply with any federal law or requirement which is or shall become a condition to the receipt of federal funds;
- (e) any highway in any city or town which is found necessary as a continuation of any state or federal highway, or any connection therewith, into and through such city or town; and
- (f) additional state highways, bridges and tunnels, outside the corporate limits of cities having a population in excess of

150,000, either in the congested traffic areas of the state or where needed to facilitate and expedite the movement of through traffic.

- (4) To acquire materials, equipment and buildings necessary for the purposes herein described; and
- (5) For such other purposes and contingencies relating and appertaining to the construction and maintenance of such highways and bridges as the commission may deem necessary and proper."

The question of the extent of the Legislature's control over the Highway Commission has been the subject of considerable discussion, particularly with reference to the matter of requiring a certain portion of state funds available for road purposes to be spent in the construction of rural roads, supplementary to the State Highway system.

At the last session of the Legislature some approaches to the problem were suggested. The Butler Bill (House Bill No. 306, 64th General Assembly), which failed to receive committee approval, would have increased the gasoline tax to four cents per gallon. No attempt was made in the bill as originally introduced to require the Highway Commission to use any portion of additional revenue to be received from the increased tax for rural roads. At least two amendments relating to some such requirement were suggested to the committee considering the bill. One would have expressly required and directed the Commission to spend the revenue received by virtue of the increased tax upon supplementary highways. Another would have expressed the purpose of the Legislature in levying additional tax to provide additional revenue for construction of supplementary highways and would have recommended to the Commission that the proceeds equivalent to that derived from a one cent per gallon tax be allocated by the Commission for the construction of supplementary highways.

The Curry Resolution (Laws of Missouri, 1947, Volume II, page 450), which was passed by both Houses of the Legislature but which was rejected by the voters at the last general election, approached the problem by way of constitutional amendment. The revenue from the one and one-half cents per gallon additional tax proposed by the amendment would have been appropriated without legislative action to a "Local, Street and Road Fund," to be apportioned to municipalities

and counties of the state for use in construction and maintenance of local roads.

In your letter you suggest that the Legislature may have authority to direct the Highway Commission to spend a portion of the funds available to it for supplementary highways by reason of the provision of Section 30 of Article IV, that the authority of the Commission to "construct and reconstruct state highways" shall be "subject to limitations imposed by law as the manner and means of exercising such authority."

It will be noted that in Section 30 of Article IV the State Highway Commission is given "authority over and power to locate, relocate, design and maintain all state highways." No limitation is placed by the Constitution upon the Commission's exercise of its authority in these matters, the limitations which may be imposed by law being confined to the manner and means of the Commission's exercising its authority to construct and reconstruct highways.

Examination of the transcript of the proceedings of the Constitutional Convention of 1945 reveals that the section originally proposed for the establishment of the Highway Commission contained no reference whatever to any limitation upon the Commission's authority. The section as originally proposed read as follows (Transcript of Debates of Constitutional Convention, page 4392):

"There shall be a state highway commission, the number, selection, compensation and tenure of whose members shall be provided b y law, except that not more than one-half of its members shall belong to the same political party, which commission shall have authority over the operation of the state highway department including the selection and removal of employees, which shall be without regard to political affiliations. Said commission shall also have authority over and power to locate, relocate, design, construct, reconstruct and maintain all state highways, and regulate access to, from and across state highways where the public interest and safety may require."

An amendment was proposed to change the last sentence of the section to read as follows: "Said commission also shall have authority over and power to locate, relocate, design and maintain all state highways. Said commission shall also have authority as provided by law, to construct, reconstruct and regulate access to, from and across state highways."

Speaking on the proposed amendment, Judge Mayer stated (page 4393):

"The lines which I strike out give the highway commission absolute authority, absolute authority, without any legislation or anything else, to locate, relocate, construct, reconstruct and maintain all said highways and regulate access to, from and across state highways where the public interest and safety may require. Now my amendment, if adopted, would do this, it would give them absolute power to locate, relocate, design and maintain all state highways. Thus far, they have the absolute power without any legislation or anybody to interfere with them."

Judge Mayer reiterated several times that his purpose in proposing the amendment was to enable the Legislature to prevent the Highway Commission from departing, without the approval of the Legislature, from the previously established method of constructing highways through competitive bidding.

Thus, it appears that the Constitutional Convention intended to permit the Highway Commission to exercise the powers granted to it free of any restriction by legislative action, except as to the means of constructing and reconstructing state highways and the regulation of access thereto.

However, as pointed out by the Supreme Court in the case of Household Finance Corporation v. Shaffner, 203 S.W.(2d) 734, 737:

"* * * while it is proper to consider the debates, 'the question in interpreting the Constitution is not so much how it was understood by its framers as how it was understood by the people adopting it, since the Constitution derives its force as a fundamental law, not from the action of the Convention, but from the people who have ratified and adopted it * * *.' ll Am. Jur. 707. The only way we can determine what meaning was conveyed by the provision is to determine what it means to us, giving the words their ordinary and usual meaning."

Taking the words of Section 30 of Article IV of the Constitution in their usual meaning, we do not believe that the limitations which the legislature is authorized to impose can be extended to require a certain amount of the Highway Department funds to be spent in constructing a particular type of road. The provision, as pointed out above, provides no limitation with regard to the Commission's exercise of its power to locate, relocate, design and maintain highways. The authority to locate would deal with the determination of where a particular road would be situated. The authority to design would deal with the matter of determining what type of road should be constructed on any particular route. The authority to maintain would deal with the keeping in repair of a road after its construction.

In these regards the Constitution makes the Highway Commission subject to no legislative restrictions. However, it does require that, once the location and design of a road has been determined by the Commission, the manner and means of construction be subject to such limitations as the Legislature may impose. We fail to see how such limitations, which must deal solely with the manner and means of construction, could constitutionally be broad enough to prescribe that a certain mileage of supplementary roads be built for each mile of primary highways. Such limitations would deal with the matter of location and design, not the means and manner of construction. We feel that the only interpretation which could reasonably be put on this provision is that which the Constitutional Convention intended, as pointed out above.

A possible basis of legislative control over the funds of the Highway Commission is suggested in Section 30 of Article IV of the Constitution of 1945. That section, which is quoted above, provides that after the deduction of certain expenses the proceeds of the motor vehicle fuel tax "shall be credited to a special fund and stand appropriated without legislative action for the following purposes, and no other: First, to the payment of the principal and interest on any outstanding state road bonds. Second, any balance in excess of the amount necessary to meet the payment of the principal and interest of any state road bonds for the next succeeding

twelve months shall be credited to the state road fund and shall be expended under the supervision and direction of the commission for the following purposes: * * * " It might be contended that the constitutional provision does not appropriate the moneys transferred to the state road fund, but rather appropriates only the balance from the sinking fund and interest fund to the state road fund, and leaves the moneys in that fund subject to appropriation by the Legislature for the purposes set out in the section. However, a study of the history of similar provisions in the amendments of 1921 and 1928 makes doubtful that such theory would be upheld by the courts.

The 1920 amendment (Laws 1921, page 707) contained the following provision:

"Any motor vehicle registration fees or license fees or taxes, authorized by law, except the property tax thereon, less the cost of maintaining any state highway department or commission, authorized by law, shall, after the issuance of such bonds, and so long as any bonds herein authorized are unpaid, be and stand appropriated without legislative action for and to the payment of the principal of the said bonds and shall be credited to a sinking fund to be provided for by law."

The effect of this provision was considered in the case of State v. Hackman, 314 Mo. 33, 282 S.W. 1007. In that case the court said (282 S.W., 1.c. 1013):

"This provision makes no attempt to appropriate, without legislative action, the money to pay the maintenance expense of the highway commission. It does appropriate without further legislative action that portion of the money received from automobile license fees which remains after deducting the cost of collecting the tax and maintaining the highway commission, and it appropriates the remainder to the payment of the principal and interest of certain bonds. It makes no attempt whatever to appropriate without legislative sanction the amount

needed for the expenses of the commission.

The amendment of 1928 (Laws 1929, page 455) changed the provision regarding application of highway funds to provide that the receipts from certain taxes and fees relating to the use of the highways, after certain numerated deductions, should:

"* * *be and stand appropriated without legislative action, to the payment of the principal and interest of the said bonds and for that purpose shall be credited to the state road bond interest and sinking fund provided by law. If in any year there should be any balance in the state road bond interest and sinking fund beyond the requirements of the next succeeding calendar year for interest and sinking fund of the said bonds, such balance shall be transferred and credited to the state road fund to be administered and expended under the direction and supervision of the state highway commission for the following purposes: * * *"

The purposes specified were similar to those found in subparagraphs 1 to 5 of Section 30 of Article IV of the Constitution of 1945.

A significant difference may be noted between the amendment of 1928 and Section 30 of Article IV of the Constitution of 1945. The 1928 amendment, quoted above, provided only that the funds in the state road bond interest and sinking fund should stand appropriated without legislative action. The balance which was transferred to the state road fund was not made subject to that provision.

The state road fund was created by an act of the Legislature (Laws 1929, page 87, Sec. 4). That provision establishing that fund read as follows (Sec. 8811, R. S. Mo. 1939, now repealed):

"There is hereby created a state road fund which shall receive all monies from the sale of bonds and all monies given the state by the United States government for road purposes and the balance transferred from the state road bond interest and sinking fund as provided in section 8810 of this article. Appropriations from this fund shall be made for all purposes of constructing, improving and maintaining the state highway system under the existing laws, laws hereinafter to be enacted, and for carrying into effect the provisions pertaining to same under the Constitution of Missouri."

Thus, it can be seen that the legislature retained the right to appropriate from the state road fund following the 1928 amendment, inasmuch as that fund was not appropriated by the Constitution, and inasmuch as the constitutional amendment specifically authorized, as pointed out above, the Legislature to enact such laws as were necessary in order to effectuate the amendment. However, Section 30 of Article IV of the Constitution of 1945 went farther than the 1928 amendment. By its terms it makes not only the state road bond fund but also the state road fund stand appropriated without legislative action. The Legislature recognized this change by enacting a new section relating to the state road fund. The new section reads as follows (Laws 1945, page 1467):

"There is hereby created and set up the State Road Fund which shall receive all moneys and credits from (1) the sale of state road bonds, (2) the United States government and intended for highway purposes, (3) the State Road Bond and Interest Sinking Fund as provided in Section 8810 of this article, and (4) any other source (a) if they are held for expenditure by or under the Department of Highways or the State Highway Commission and (b) if they are not required by Section 8809 to be transferred to the State Highway Department Fund. The costs and expenses withdrawn from the state treasury (1) for locating, relocating, establishing, acquiring, reimbursing for, constructing, improving and maintaining state highways in the systems specified in Article IV, Section 30, of the Constitution, (2) for acquiring materials, equipment and buildings, and (3) for other purposes and contingencies relating and appertaining

to the construction and maintenance of said highways shall be paid from the State Road Fund upon warrants drawn by the State Auditor, based upon bills of particulars and vouchers preapproved and certified for payment by the State Comptroller and by the State Highway Commission acting through such of their employees as may be designated by them. No payments or transfers shall ever be made from the State Road Fund except for an expenditure made (1) under the supervision and direction of the State Highway Commission and (2) for a purpose set out in subparagraphs (1), (2), (3), (4), or (5) of Section 30, Article IV, of the Constitution."

It will be noted that this new section eliminated any reference to appropriation by the Legislature from the state road fund. The Legislature has continued to appropriate from this fund (See Laws 1947, Volume II, page 88), just as it has continued to appropriate from the state road bond interest and sinking fund (See Laws 1947, Volume II, page 35), but such appropriations are unnecessary in view of the fact that the funds stand appropriated by reason of the constitutional provision.

Thus, it appears that the Constitution of 1945 has removed the State Highway Commission and the expenditures of state road funds from legislative control, except for the matter of means and manner of constructing and reconstructing highways and limitation of access to state highways. It is believed that the authority of the Legislature to impose limitations as to the means and manner of construction is confined to the method employed by the Commission in expending funds for construction and is not intended to apply to the type of roads which the Commission might decide to construct. If such is the case, the Legislature could make no binding requirement that any funds raised from additional gasoline taxes be expended in a certain proportion for primary and secondary highways, in the absence of a constitutional amendment.

Another possible approach to the matter would be along the lines of the amendment proposed to the Butler Bill, which would have recommended to the Highway Commission that a certain portion of the increased tax be spent for supplementary highways. This was, of course, brought forward solely as a matter of recommendation and with the realization that it would have no binding effect upon the State Highway Commission. Of course, in the event that the Commission should see fit to disregard the Legislature's wishes, the recourse of the Legislature would be to repeal the additional tax.

Conclusion.

Therefore, this department is of the opinion that the state road fund may be expended by the State Highway Commission for the purposes specified in Section 30 of Article IV, Constitution of 1945, and that the Legislature has no authority to prescribe either the type of highways for which said fund is expended or the ratio of expenditure for primary and secondary highways.

Respectfully submitted,

ROBERT R. WELBORN Assistant Attorney General

APPROVED:

J. E. TAYLOR Attorney General

RRW: ml

COUNTY SURVEYOR:

Vacancy filled by appointment by Governor; appointee need not be resident of county.

May 25, 1949

Hon. Albert D. Nipper Prosecuting Attorney Washington County Potosi, Missouri FILED 67

Dear Sir:

We have received your request for an opinion of this department, which request is as follows:

"My problem is as follows: In the last election our incumbent County Surveyor did not run. One, Mr. Edelman, did run and was elected but failed to qualify or desire to qualify. It was my opinion that the office would then be vacant and the then incumbent would hold over.

"Question: What is the proper procedure for the filling of this vacancy? Must there be a special election or does the Governor fill the vacancy? Must the appointee or candidate be a resident of this county? What is proper if there is none available in this county?"

We are enclosing herewith a copy of an opinion of this department dated September 24, 1948, in which it is held that a duly elected county surveyor holds over at the expiration of his term upon the failure of his successor to qualify. We are also enclosing a copy of an opinion dated February 18, 1949, holding that a vacancy is created in the office of coroner upon failure of the coroner-elect to give bond and that the incumbent coroner is entitled to hold over the office until the vacancy is filled.

As for the method of filling the vacancy in the case which you have presented, there is no express provision for filling vacancies in the office of county surveyor. Therefore, Section 11509, R. S. Mo. 1939, adopted pursuant to Section 4 of Article IV of the Constitution of 1945, is applicable. That section provides:

"Whenever any vacancy, caused in any manner or by any means whatsoever, shall occur or exist in any state or county office originally filled by election by the people, other than the office of lieutenant-governor, state senator, representative, sheriff or coroner, such vacancy shall be filled by appointment by the governor; and the person so appointed shall, after having duly qualified and entered upon the discharge of his duties under such appointment, continue in such office until the first Monday in January next following the first ensuing general election - at which said general election a person shall be elected to fill the unexpired portion of such term, or for the ensuing regular term, as the case may be, and shall enter upon the discharge of the duties of such office the first Monday in January next following said election: Provided, however, that when the term to be filled begins or shall begin on any day other than the first Monday in January, the appointee of the governor shall be entitled to hold such office until such other date."

In view of this provision, the vacancy should be filled by appointment by the Governor.

As to the question of whether or not the applicant must be a resident of the county, the statute makes no such requirement. Section 13190, R. S. Mo. 1939, found in Laws of 1945, page 1759, provides merely for the election of "some suitable person as county surveyor." Nothing further is said regarding his qualifications.

The rule generally is that, in the absence of an express constitutional or statutory provision making residence within the district or political unit a condition of eligibility to hold office therein, such residence is not considered necessary. 42 Am. Jur., Public Officers, Section 45, page 914, Ann. 120 A.L.R. 672. In view of this rule, the only residence requirement would be that found in Section 8 of Article VII of the Constitution of 1945, to wit, residence in the state for one year next preceding the appointment.

Conclusion.

Therefore, it is the opinion of this department that a vacancy caused by the failure of the person elected to qualify in the office of county surveyor should be filled by appointment by the Governor and that the appointee need not be a resident of the county for which he is appointed, the only residence requirement being residence in this state for one year next preceding the appointment.

Respectfully submitted,

ROBERT R. WELBORN Assistant Attorney General

APPROVED:

J. E. TAYLOR Attorney General

RRW:ml

Encs (2)

(Opinions enclosed rendered to Hon. R. M. Gifford, Prosecuting Attorney of Sullivan County, Sept. 24, 1948; Hon. Walter H. Toberman, Sec'y of State, Feb. 18, 1949.)

APPROPRIATION: DEPT. OF RESOURCES AND DEVELOPMENT:

Legislature may appropriate funds to CIVIL AIR PATROL: the Dept. of Resources and Development to aid in an educational program related to aviation such as that fostered by the Civil Air Patrol.

October 31, 1949

Hon. John W. Noble Chairman, Appropriations Committee Missouri Senate Jefferson City, Missouri



Dear Senator Noble:

This department is in receipt of your letter requesting an opinion upon the following question:

> "Can an appropriation be made to the State Department of Education or Department of Resources and Development to be used in assisting civil air patrol in their educational program, such funds to be used only for such expenditures as authorized by the Civil Air Patrol Regulation No. 1732, dated September 1, 1949."

Regulation No. 173-2 lists the normal and usual expenses connected with maintaining its educational program, such as equipment, maintenance, classroom space, publication, etc., and does not include any item for salaries of officers.

The Civil Air Patrol is a volunteer organization of over one hundred thousand members under the supervision of the United States Air Force. In each state there is a Wing Headquarters under the supervision of a liaison officer who has an enlisted assistant and a civil service secretary. These three persons are paid by the United States Air Force and are Federal employees. The organization is composed of persons who voluntarily join, who receive no compensation from any source, and the general purpose of the organization is to promote civil aviation. During the war they were given specific duties, and it is believed that while engaged in coast patrol and other duties assigned by the Air Forces the individuals were members of the Armed Forces, but in the present organization they have purely a civilian status and are not in any way members of the Air Forces either in an active or reserve status. It is believed that many members of the Civil Air Patrol are reserve officers of the Air Forces.

Aside from the general nature of the organization, your inquiry requires consideration only of its educational program. One of the chief functions of the Civil Air Patrol is the training of American youths in the fundamentals of aeronautics. Classes are set up, taught by members of the Civil Air Patrol and students designated as cadets are taught map reading, theory of flight, meteorology, flying safety, navigation, aircraft structures, engines, construction, instruments, crash procedure and Civil Air regulations. The course is, it may be said, to embrace a thorough instruction including what are designated as ground school subjects of aviation. It does not include any flight training. The subjects offered embrace a more thorough course in theoretical aeronautics even than that required for a private license to fly under the Civil Air regulations.

An examination of the above activities of the Civil Air Patrol clearly indicates that said organization is offering an intensive and varied educational program related to aviation. The value of its program is made even more impressive when this fact is considered, that is, that any and all interested persons may attend classes conducted by the Civil Air Patrol free of charge. Those that wish to may pay a very nominal fee and become actual members of the Civil Air Patrol, but enrollments are by no means a prerequisite to attaining the benefits of this educational program.

Therefore, it is readily apparent that the Civil Air Patrol is conducting an educational program of a nature unquestionably of great value in promoting public interest and information in matters related to aviation.

In determining whether an appropriation can properly be made, it must be determined whether the Department of Education or the Department of Resources and Development is authorized to aid in this activity. No statute is found whereby the Department of Education is authorized to conduct or supervise any educational program such as that conducted by the Civil Air Patrol. It has been suggested that possibly this could be considered as vocational or prevocational education. This is negatived by the provisions of Section 10540, R. S. 1939, which defines the terms as follows:

"(a) Vocational education shall mean any education of less than college grade, the controlling purpose of which is to fit for profitable employment.

"(b) Prevocational education shall mean that form of education of less than college grade which gives children an elementary acquaintance with different vocational activities, arts or occupations and better prepares them to make an intelligent choice of a vocation."

Possibly by a liberal construction education in any subject might better prepare one "to make an intelligent choice of a vocation," but the duties of the State Board of Education, as defined in Sections 10531 and 10534, restrict the vocational program to "training in agriculture, industrial, home economics and commercial subjects." The statute contemplates that the program of vocational and prevocational education should be conducted in local public schools (Sections 10531, 10532, 10534, 10537, R. S. 1939), meeting certain standards set up by the State Board or the Department of Education. The Department of Education is not authorized to aid or provide equipment for a system of education conducted by volunteer teachers independent of the public school system.

The Department of Resources and Development was created by the act approved July 20, 1943, found in Laws of Missouri, 1943, page 978, et seq. By Section 7 of the act the commission is authorized to "encourage the development of the aeronautical resources of the state and aid in an educational program related to aviation."

In an opinion to Mr. Hugh Denney, Director of the Division of Resources and Development, dated June 5, 1947, this department discussed this provision and held that the Division of Resources and Development was not authorized to inspect flying schools. In that opinion it was said:

"We must determine from the context of these statutory provisions whether or not the Legislature intended the Division to engage in such inspection activities. You will note that under subsection (g) of Section 15393.7, the Division is authorized to aid in an educational program related to aviation. We submit that the educational program referred to in that section is not a limited one of instruction in a course of study, but rather is an overall public

relations program designed to present to the public the advantages of aviation, to encourage the use of aeronautical facilities in Missouri, and generally to promote the aviation industry; in other words, to educate the public, by advertising and the dissemination of pertinent data and information, in aviation and inform them of the aeronautical resources of the State, thereby encouraging their development. This construction is in keeping with the apparent policy of the General Assembly as set out in Section 15393.7, by which the purposes and objectives of the Division are to be accomplished."

In another opinion to Mr. Denney, dated August 1, 1947, it was said:

"The intention of the General Assembly must be taken from the context of all the provisions relating to the scope of authority of the provision. Said provisions clearly show that the purposes and objectives of the Division are to be accomplished by advertising and the dissemination of pertinent data and information concerning the various enumerated fields. Section 15393.7, subsection (g), must be read and construed in connection with these provisions. Therefore, it reasonably appears, from a fair interpretation of these provisions, that the authority granted by that part of Section 15393.7, subsection (g), which reads, 'encourage the development of the aeronautical resources of the state, ' is such as will authorize the Division to inform the public of the aeronautical resources of the state, thereby encouraging their development. In other words, we submit that the General Assembly authorized a general public relations program designed to present to the public the advantages of aviation; to encourage the use of aeronautical facilities in Missouri, and to promote the aviation industry in this manner."

From these opinions it appears that it was then the opinion of this department that the Division of Resources and Development is authorized to encourage the development of the aeronautical resources of the state by a public relations program designed to present to the public the advantages of aviation. The opinions referred to represent the present opinion of this department.

It is believed that the educational program offered by the Civil Air Patrol is such a public relations educational program. It is difficult to see a better way of acquainting the public with the advantages of aviation than to offer general free instruction to the public generally.

To sum up, then, the Department of Resources and Development is authorized "to aid in an educational program related to aviation." The Civil Air Patrol is at the present time engaged in an intensive and effective program of educating the people of this state in a wide assortment of subjects related to aviation. Thus, it would seem that an appropriation to the Department of Resources and Development to be used in assisting and co-operating with the Civil Air Patrol in its program is eminently authorized by Laws of Missouri, 1943, page 981, Section (g).

CONCLUSION

It is the opinion of this office that an appropriation may be made to the Department of Resources and Development to be used, in co-operation with the Civil Air Patrol, in promoting an educational program related to aviation.

Respectfully submitted,

H. JACKSON DANIEL Assistant Attorney General

APPROVED:

J. E. TAYLOR Attorney General AUTOMOBILES:

Registered dealers in automobiles required to maintain record prescribed by subparagraph (b) of Sec. 8381, R.S. Mo. 1939.

March 25, 1949

4-19



Colonel Jeremiah O'Connell Chief of Police Department of Police 1200 Clark Avenue St. Louis (3) Missouri

Dear Sir:

Your recent request for an opinion from this office is quoted herewith, together with excerpts from the supplementary report which was attached to the request, such excerpts being necessary to a full statement of facts in this case.

"Attached are self-explanatory reports by Sergeant Richard Jerabek, of our Automobile Theft Squad, concerning the arrest of one William Charles Weber, an automobile dealer, on charge of 'failing to maintain a record.'

"Application for warrant against Weber was instituted under Section 8381, Paragraph B, and Mr. Jasper Vettori, Assistant Prosecuting Attorney, City of St. Louis refused to issue a warrant for the reasons set out in attached report.

"For our information, it is requested that you give us an opinion as to the legality of Mr. Vettori's interpretations and conclusions in this matter."

DEPARTMENT OF POLICE CITY OF ST. LOUIS Supplementary Report:

"1. In the reports describing the arrest of William Charles Weber, 48 years, born in Missouri, married, merchant (automobile dealer), operator of the Weber Auto Sales, 3347 South Kingshighway Boulevard, it is indicated that subject operated under Missouri Automobile Dealer's Registration

#D-1348 and has applied for 1949 Dealer's Registration. It is also indicated that upon initial application for warrant, the facts were presented to Mr. Jasper Vettori, Assistant Prosecuting Attorney, who advised that the warrant would be taken under advisement and that this date the warrant was refused due to the lack of sufficient evidence.

- "3. In the descriptive report of the circumstances culminating in the arrest of subject Weber, it is indicated that a certain motor vehicle was purchased by Weber, who in turn disposed of that vehicle and failed to record the acquisition and disposal of instant motor vehicle. Prior to his arrest, Weber had refused to acknowledge the purchase of instant vehicle or divulge the identity of the individual to whom he had delivered that vehicle. After the subject's arrest he was interrogated at this office and he then disclosed the identity of the seller and purchaser of instant vehicle, reporting that no record had been made of the purchase or sale, due to both transactions being on a cash basis.

* * * * * * * * * * * * * *

"5. Mr. Vettori reported that it is his conclusion that the described section would be applicable to a registered automobile dealer, ONLY, when that registered dealer accepted a motor vehicle or trailer for the purpose of re-sale for some individual, the dealer at no time acquiring actual ownership of that vehicle, but merely acting as an agent. Should the dealer acquire actual ownership of the vehicle, the described section is not applicable.

It becomes necessary for the purpose of this opinion to make a concise statement of the question to be determined. The fact situation as presented poses the following query: Do the provisions of subparagraph (b) of section 8381, R.S. Mo., 1939, require a registered dealer in automobiles to maintain the records described therein when the dealer acquires actual ownership of the vehicle?

The conclusion to be reached in this case will rest on a construction of language contained in section 8381, R.S. Mo., 1939, and the statute is now quoted in its entirety:

Section 8381.

- "(a) Every dealer shall make a monthly report to the commissioner, on blanks to be
 prescribed by the commissioner, giving the
 following information: Date of the sale of
 each motor vehicle sold; date of delivery of
 same; the name and address of the buyer; the
 name of the manufacturer; motor number; style
 of vehicle, motive power; horsepower: and it
 shall also state whether the motor vehicle
 is new or second-hand and the rated live load
 capacity of commercial motor vehicles.
- "(b) Every dealer and every person operating a public garage shall keep for inspection of proper officers, a correct record of the registration, number, motor number, manufacturer's name, of all motor vehicles or trailers accepted by him for the purpose of sale, rental, storage, repair or repainting, together with the name and address of the persons delivering such motor vehicle or trailer to the dealer or public garage keeper, and the person delivering such motor vehicle or trailer shall record such information in a book kept for that purpose by the dealer or garage keeper.
- "(c) The alteration or obliteration of the motor number on any such motor vehicle shall be prima facie evidence of larcency and the dealer or person operating such public garage shall upon his discovery of such obliteration or alteration immediately notify the sheriff, marshal,

constable or chief of police of the municipality wherein the dealer or garage keeper has his place of business, and shall hold such motor vehicle or trailer for a period of forty-eight hours for the purpose of an investigation by the officer so notified."

No court decision has been found in this state construing the section above quoted. The construction to be placed on the statute must be based on a reading of the language used, coupled with known objectives and purposes of the law of which this particular section is a part. On numerous occasions our Appellate Courts have made reference to the purposes and objectives of the Motor Vehicle Act of Missouri. The section under consideration has remained unchanged since its appearance in Missouri Laws of 1921, Extra Session, p. 87. Before directing attention to the specific language used in section 8381, supra, we quote from the case of Howell v. Connecticut Fire Insurance Company, 257 S.W. 178, l.c. 181, decided by the Springfield Court of Appeals in 1923:

"The law was passed as a general welfare safeguard to prevent the trafficking in stolen cars and, in order to prevent that evil which had become prevalent, the Legislature saw fit to require that parties dealing in motor cars comply with said regulations."

The above case has been cited approvingly in State ex rel. Connecticut Fire Insurance Company v. Cox, 306 Mo., 537, 268 S.W. 87; and in Pearl v. Interstate Securities Co., 198 S.W. (2nd) 867.

A reading of section 8381, R.S. Mo. 1939, supra, and particularly subsection (b) thereof discloses no ambiguity on its face. It has been suggested (See quoted excerpts from Supplementary Report) that the provisions contained in this subsection (b) would be applicable to a registered automobile dealer only when that registered dealer accepted a motor vehicle or trailer

for the purpose of re-sale for some individual, the dealer at no time acquiring actual ownership of that vehicle, but merely acting as agent, and that if the dealer should acquire actual ownership of the vehicle the described subsection would not be applicable. To adopt such a suggestion would be, in our opinion an attempt to implement the statute by writing into it an exception which has not been placed therein by the lawmaking body. Such an interpretation would violate accepted rules of statutory construction.

In the case at hand we have a registered dealer admittedly not keeping a record which is required by law to be maintained. Failure to maintain the record could in all probability lead to a mischief which the law has intended to prevent. The gravamen of the offense is in the failure to maintain the prescribed record. Courts will so construe a statute as to suppress a mischief, advance the remedy and suppress subtle inventions and evasions for the continuation of the mischief, and will add force and life to the enactment according to the true intendment of the makers of the act for the good of the public. Decker v. Deimer, 229 Mo., 296 S. W. 936; Vining v. Probst 186 S.W. (2nd) 661.

CONCLUSION.

It is the opinion of this department that the provisions of subparagraph (b) of section 8381, R.S. Mo. 1939, are to be complied with by a registered dealer in automobiles even though the dealer should acquire title in himself to the automobiles.

Respectfully submitted,

APPROVED:

JULIAN L. O'MALLEY Assistant Attorney General

J. E. TAYLOR Attorney General COUNTY COURTS: Action of county court in providing for adoption and carrying out of county plan and appointing county planning commission, regulating and restricting height, number of stories, etc., or buildings dividing the unincorporated territory of county into various districts, and providing manner in which the regulations, restrictions and boundaries of the districts shall be determined, established and enforced is exercising administrative and not judicial power.

June 30, 1949

Honorable Ben W. Oliver House of Representatives State Capitol Building Jefferson City, Missouri 68

Dear Sir:

This is in answer to your letter of recent date requesting an official opinion of this department and reading in part as follows:

"Laws of Missouri, 1945, Section 1A, page 1328, authorizes county courts in all counties of the first class to provide for the preparation, adoption, amendment, extension or carrying out of a county plan, and to create by order a county planning commission with the powers and duties set forth in the act.

"Laws of Missouri, 1945, Section 8, page 1330, then authorizes county courts in all counties of the first class to regulate and restrict by order the height, number of stories, size of buildings, etc. for 'the purpose of promoting health, safety, morals, comfort or the general welfare of the unincorporated portion of counties.'

"Laws of Missouri, 1941, Section 9, page 485, then provides that the unincorporated territory may be divided into districts of such number, shape and area as may be deemed best suited to carry out the purposes of the act.

"Laws of Missouri, 1941, Section 10, page 486, then provides that the county court shall provide for the manner in which such regulations, restrictions and boundaries of such districts shall be determined, established and enforced. In order to avail itself of the power conferred by

the act, the county court may request the county planning commission to recommend the boundaries of the various original districts and appropriate regulations to be enforced therein. Such commission makes a preliminary report and a proposed zoning order and holds public hearings thereon, affording persons interested an opportunity to be heard. Within 90 days after final adjournment of such hearing, the commission must make a report and submit a proposed order to the county court. The county court may then enact the order with or without change, or refer it back to the commission for further consideration.

"I would appreciate your early opinion as to whether county courts in counties of the first class may enact the orders referred to in the above sections, assuming all statutory requirements have been complied with."

The county planning and zoning law, found Laws of Missouri, 1945, page 1327, provides as set out in your opinion request in various sections for the county court to make the orders you have listed. If the power exercised by the county court is judicial, such sections are unconstitutional, but if the actions of the county court are administrative, such acts are constitutional since Section 7, Article VI of the present Constitution provides that the county court "shall manage all county business as prescribed by law and keep an accurate record of its proceedings."

The latest case of the Supreme Court dealing with the question of what constitutes judicial action by a county court is the case of State ex rel. Lane vs. Pankey, et al., No. 41324, En Banc (not yet published). In this case, the court was passing upon the action of the county court in establishing public roads under provisions of Sections 8473 to 8478, inclusive, R. S. Mo. 1939. The court said:

" * * * The new Constitution, as construed in the Rippeto case and as we now construe it, invalidates no provision of existing statutes relating to the authority of county courts over public roads except such as purport to authorize the county court to exercise judicial power. A county court can no longer adjudge the compensation to be paid for lands to be taken for road purposes nor render judgment divesting title from the owners thereof. But such court may take all statutory steps to determine the necessity, location, width and type of construction of public county roads, to determine whether same shall be constructed in whole or in part at county expense, and, when title has been legally acquired, to perform the administrative functions of supervising the construction and maintenance of such roads."

We believe that the provisions of Section IA, Laws of Missouri, 1945, page 1328, obviously do not involve judicial action since the necessity for the preparation, adoption, amendment, extension or carrying out of the county plan under the holding in the Lane case, supra, is administrative.

In the case of State ex Inf. vs. Loesch, 169 S.W. (2d) 675, where the county zoning law applicable to St. Louis County at the time such case was decided was under attack because of an allegation that such law delegated legislative power to the county court, it was held that the county court appointed, rather than created, a county planning commission, and obviously such power of appointment is administrative. The court, in the Loesch case, supra, pointed out that the county planning and zoning law, applicable to St. Louis County, was for all practical purposes the same as the law which at that time was applicable solely to Jackson County and which is the basis for the present county planning and zoning law, and we believe that the holdings in such case are applicable to the present law.

The power of the county court to regulate and restrict in unincorporated portions of the county, the height, number of stories, and size of buildings, the percentage of lots that may be occupied, the size of yards, courts and other open spaces, the density of population, the location and use of buildings, structures and land for trade, industry, residence or other purposes, is, under the holding in the Lane case, supra, administrative rather than judicial. It is obviously county business. In the Loesch case, supra, the court said, l.c. 680:

"If it is not the county's business to look after the health and welfare of people living in the unincorporated sections of a county, whose business is it? It seems to us to be purely the business of a county and its citizens and to be so self-evident it need not be considered. * * * "

The provision that the unincorporated territory of a county may be divided into districts of such number, shape and area as may be deemed best suited to carry out the purposes of the act obviously comprehends administrative rather than judicial action.

The provision that the county court shall provide the manner in which the regulations, restrictions and boundaries of such district shall be determined, established and enforced are administrative because the penalties for violation of the act are laid down by the Legislature and the county court has the power only to implement such provisions of the act.

We do not attempt in this opinion to pass upon the question of whether or not Sections 9 and 10, Laws of Missouri, 1941, page 485, are in full force and effect under the provisions of Section 15A, Laws of Missouri, 1945, page 1327, since we presume the constitutionality of law.

CONCLUSION

It is the opinion of this department that the actions of county courts in counties of the first class, taken under provisions of Sections 1A and 8, Laws of Missouri, 1945, page 1328, and Sections 9 and 10, Laws of Missouri, 1941, page 485, are not judicial but are administrative acts, and that such county courts may at present take the action authorized by such statutes.

Respectfully submitted,

APPROVED:

C. B. BURNS, JR. Assistant Attorney General

J. E. TAYLOR Attorney General

CBB:VLM

ATHLETIC COMMISSION:

Proceeds to licensee from concessions are part of gross receipts of boxing or wrestling exhibitions.

July 18, 1949

1/26/49

Col. Chas. P. Orchard Chairman, Missouri State Athletic Commission 3914 North Union Boulevard St. Louis 15, Missouri



Dear Sir:

We have received your request for an opinion of this department, which request reads, in part, as follows:

"Pursuant to Section 14604, Chapter 106, Revised Statutes, as amended, the previous athletic commission, or its predecessor, adopted the following rule:

"'20. Concessions operated at all boxing and wrestling shows under the supervision of the organization holding the charter to promote such shows for the privilege of operating such concessions shall pay to the State of Missouri, a license fee equal to 5 per cent of the gross sales for each individual attraction. Concessions so operated at boxing and wrestling events are considered part of gross revenue and subject to this tax.'

"There is some question in my mind as to whether or not the athletic commission is within its power in adopting such a rule, for the reason that the concessions, particularly at the Auditorium here in St. Louis where the contests are usually held, are not operated by the organization holding the charter to promote the show, but under a contractual arrangement with the management of the Auditorium, or the City of St. Louis.

"I would appreciate an opinion from you as to whether or not it is the duty of the commission to collect a license fee equal to five per cent of the gross fees of the concessions operated at all boxing and wrestling shows in the city."

Section 14604, R. S. Mo. 1939, as amended, Laws of 1947, Volume I, page 216, provides:

"That the athletic commission of the State of Missouri shall have general charge and supervision of all boxing, sparring and wrestling exhibitions held in the state of Missouri, and it shall have the power, and it shall be its duty: First, to make and publish rules and regulations governing in every particular the conduct of boxing, sparring and wrestling exhibitions, the time and place thereof, and the prices charged for admission thereto. Second, to accept application for and issue licenses to any bona fide patriotic, benevolent, fraternal or religious organization or local unit thereof, desiring to promote boxing, sparring and wrestling exhibitions, which has been in existence and has held meetings at regular intervals during the year immediately preceding the granting of the license, and to revoke the same at its pleasure; said application shall designate the city in which the organization or local unit thereof intends to operate, and the license granted shall entitle said organization, or local unit thereof, to conduct such boxing, sparring and wrestling exhibitions in that city, and no other. Third, to charge fees for such license of ten dollars (\$10.00) for every license issued and to charge five per cent of the gross receipts of every boxing, sparring or wrestling exhibition held. Such funds to be paid to the Division of Collection in the Department of Revenue, which shall pay said funds into the state treasury to be set apart into a fund to be known as the athletic commission fund."

In determining the validity of the rule in question, the fundamental principle must be kept in mind that the Athletic Commission may make only such rules and regulations as fall within the enactments of the Legislature. Although the statutory provision does authorize the Commission to make rules and regulations "governing in every particular the conduct of boxing, sparring and wrestling exhibitions," the Commission may not exercise such power to exact a license fee not authorized by the Legislature. The rule in question, on its face, purports to exact a license fee of five per cent on the sale of concessions, and, as such, is beyond the authority of the Commission inasmuch as it has not been authorized to license concessions.

However, the question remains as to whether or not proceeds from concessions are part of gross proceeds of boxing, sparring and wrestling exhibitions. If so, the Commission is required to charge and collect five per cent thereof for the credit of the Athletic Commission fund.

The statute does not attempt to define what shall be included in the term "gross receipts." There is no provision limiting the term to gross receipts from admission charges. In the case of State v. Hallenberg-Wagner Motor Co., 341 Mo. 771, 108 S.W. (2d) 398, the court considered the meaning of the word "gross," as used in the Missouri Sales Tax Act in levying a tax upon the "gross receipts" of sales of tangible personal property (Laws of Mo. 1933-34, Extra Session, page 155, Section 2). In the course of its opinion the court discussed the meaning of the term as follows (108 S.W. (2d), 1.c. 401):

" * * * 'gross' accentuates the 'receipts' of the taxpayer upon which the tax imposed is to be computed. Gross means: '4. Whole; entire; total; as, the gross sum, amount, weight; -opposed to net. The gross earnings, receipts, or the like, are the entire earnings, receipts, or the like, under consideration, without any deduction.' Webster's New International Dictionary (2d Ed.) tit. 'Gross.' All means: The whole of:-used with a singular noun or pronoun, and referring to amount, quantity, extent, duration, quality, or degree: as. all the wheat; all the year; all this. * * 2. The whole number or sum of; -used collectively, with a plural noun or pronoun

expressing an aggregate. * * * 3. Every member or individual component of; each one of; -used with a plural noun. In this sense, all is used generically and distributively. * * * Syn.-All, every, each agree in inclusiveness, but differ in stress. All collects, every divides, each distributes. All refers rather to the aggregate under which the individuals are subsumed than to the individuals themselves: as, all men are mortal. Every refers to the individuals, but never denotes the separate individual; as, every man must die. Each refers to the separate individual, but never denotes this or that one in particular; as, each must meet death alone. Id., tit. 'All.' 'Gross' and 'all'--whole, entire, total--uncompromisingly express the aggregate of the parts, undiminished and intact. * * *"

In view of the fact that the statute does not limit the term "gross receipts" to receipts from admission charges, but rather refers simply to gross receipts of boxing, sparring and wrestling exhibitions, we feel that the Commission may consider the amount received from concessions by the licensee of the Commission promoting the exhibition part of the gross receipts of the boxing, sparring and wrestling exhibitions.

Inasmuch as the Commission is not authorized to exact a license fee from concessionaires, as such, we do not feel that the five per cent fee could be charged upon the gross receipts of the concessionaires unless the concessions are operated directly by the licensee promoting the exhibition. In the absence of such direct handling of concessions by the licensee, only the amount received by the licensee from concessions should be included as gross receipts of boxing, sparring and wrestling exhibitions.

Conclusion.

Therefore, it is the opinion of this department that the proceeds from concessions received by a licensee of the Missouri Athletic Commission promoting a boxing, sparring and wrestling

exhibition are part of the "gross receipts" of such boxing, sparring and wrestling exhibition and should be included under Section 14604, R. S. Mo. 1939, as amended, in determining the amount of the five per cent fee payable on the "gross receipts of every boxing, sparring or wrestling exhibition held."

Respectfully submitted,

ROBERT R. WELBORN Assistant Attorney General

APPROVED:

J. E. TAYLOR Attorney General

RRW:ml

VITAL STATISTICS HEALTH:

BIRTH CERTIFICATES:

Residents of Missouri born elsewhere may record such birth in this State if the birth is not recorded in any other State or county or municipal office upon the furnishing of

proof required by the registrant.

October 31, 1949

1/1/49

Honorable Ben W. Oliver House of Representatives Jefferson City, Missouri

Dear Mr. Oliver:

This department is in receipt of your request for an interpretation of certain provisions in House Bill No. 207, relating to vital statistics, which became effective October 14, 1949. Your inquiry is, in part, as follows:

"I wish you would please give me an opinion in reference to the phrase 'not recorded in any other state' as contained in House Bill 207. The department of Health and Welfare does not know whether this is broad enough to mean the department of such other state having the records in reference to vital statistics under their control, or whether it would mean also any county or municipal office having such records also.

"Also please advise what proof shall be required of the fact that the birth of the applicant or registrant is not recorded in any other state?"

House Bill No. 207 amended the act approved May 10, 1948, Laws of 1947, Vol. II, page 237, by repealing Section 20 and sub-section 1 of Section 22 of said act and enacting a section and sub-section in lieu thereof. Your inquiry is directed to the new Section 20, which is as follows:

"A person born in this state, or a resident of Missouri born outside of this state whose birth is not recorded in any other state, may file, or amend a certificate after the time herein prescribed, upon submitting such proof as shall be required by the division, or by any court."

You have advised us that the Bureau of Vital Statistics, Division of Health, considers the provision relative to the recording of a birth "in any other state" indefinite, as not defining specifically whether it includes the recording of a birth in county and city offices or only in the state office registering births and other vital statistics.

The language of the statute seems plain that in order to file or amend a certificate the person doing so must state that his birth is not recorded in any other state. This seems a most reasonable and necessary provision. We take the term "state" to mean the states of the United States and territories and possessions of the United States where recordation is carried on. We believe that a reasonable interpretation to be given the phraseology "recorded in any other state" would include any county or municipal office where such birth may be recorded. In the event a copy of such record would be available to the person interested it would certainly be of more evidentiary value than one filed in the Bureau of Vital Statistics of Missouri under the provisions of House Bill No. 207.

The statute provides that such new or amended certificate shall be filed "upon submitting such proof as shall be required by the division." As a matter of practical administration, it would seem reasonable that the applicant should state under oath that his birth is not recorded in any other state, and particularly that the same is not recorded in the state in which he was born. The filing of a certificate by a resident of Missouri who was born in another state must be accompanied by the usual proof of facts as to the date and place of birth.

Under the law prior to the enactment of the Vital Statistics Act, there was a requirement that a resident of Missouri born outside the state had to file the affidavits of at least two persons knowing the facts in order to have a birth registered in Missouri. The affidavits had to be sworn to before a notary. The State Registrar had the authority to require further evidence to establish the truth of the facts and could withhold filing of such birth certificate until the requirements were complied with. (Section 9775, R.S. Mo. 1939.)

It would seem perfectly reasonable for the Division to accept the affidavit of the applicant as sufficient proof of the fact that his birth is not recorded in another state. As a matter of fact, there is little chance that an applicant would misrepresent the facts concerning registration since,

if his birth was recorded elsewhere, there would be little use in filing the certificate in this state. As a general rule, administrative tribunals are not bound by the strict or technical rules of evidence governing jury trials, especially where the administrative order has only the effect of prima facie evidence. (42 Am. Jur. 461.) The rule concerning reception of evidence by administrative agencies is well set out in the case of Spillers vs. Atchison, T. & S.F.R. Co., 253 U.S. 117, 64 L. Ed., 810, 40 S. Ct. 466. In that opinion the court said:

"In Interstate Commerce Commission v. Baird, 194 U.S. 25, 44, 48 L. ed 860, 869, 24 Sup. Ct. Rep. 563, it was said: The inquiry of a board of the character of the Interstate Commerce Commission should not be too narrowly constrained by technical rules as to the admissibility of proof. Its function is largely one of investigation, and it should not be hampered in making inquiry pertaining to interstate commerce by those narrow, rules which prevail in trials at common law, where a strict correspondence is required between allegation and proof. In Interstate Commerce Commission v. Louisville & N.R. Co. 227 U.S. 88, 93, 57 L. ed. 431,434, 33 Sup. Ct. Rep. 185, the court recognized that the Commission is an administrative body, and, even where it acts in a quasi judicial capacity, is not limited by the strict rules as to the admissibility of evidence which prevail in suits between private parties.' And the fact that a reparation order has at most only the effect of prima facie evidence (Meeker v. Lehigh Valley R. Co. 236 U.S. 412, 430, 59 L. ed. 644, 657, P.U.R. 1915 D. 1072, 35 Sup. Ct. Rep. 328, Ann. Cas. 1916B, 691; Meeker v. Lehigh Valley R. Co. 236 U.S. 434, 439, 59 L. ed. 659, 661, 35 Sup. Ct. Rep. 337; Mills v. Lehigh Valley R. Co., 238 U.S. 473, 482, 59 L. ed. 1414, 1418, 35 Sup. Ct. Rep. 888), being open to contradiction by the carrier when sued for recovery of the amount awarded, is an added reason for not binding down the

Commission too closely in respect of the character of the evidence it may receive or the manner in which its hearings shall be conducted.

The statute authorizes the Division of Health to require such proof as may be reasonable, and under this authorization the Division may make a general regulation specifying what proof shall be required or it may pass upon the proof submitted by a particular applicant.

CONCLUSION

It is the opinion of this department that a resident of Missouri born outside of this state may file or amend the certificate upon submitting such proof as may be required by the Division of Health that his birth is not recorded in any other state, and particularly in the state of his birth, together with proof of place and date of birth.

Respectfully submitted,

JOHN R. BATY Assistant Attorney General

APPROVED:

J. E. TAYLOR Attorney General

JRB:irl

COUNTY COURT:

County officers in counties of the fourth class are unauthorized to purchase supplies for their respective offices.

FILED 69

February 3, 1949

Honorable James L. Paul Prosecuting Attorney McDonald County Pineville, Missouri 2.8

Dear Sir:

This will acknowledge receipt of your request for an opinion which reads:

"Please furnish me at as early a date as possible an opinion on the following:

"Does a county court in a fourth class county have the right to deny various office holders the right of purchasing their own supplies and create a central purchasing agent, or is it the inherent right of the various officials in this county to purchase their own necessary supplies in accordance with their needs?

"In as much as, the county court is attempting to create this purchasing agent and is attempting to slash budgets of the various county officers, I would appreciate as early reply as possible."

We regret to have withheld rendering this opinion before this date but your request raises a very close and important question and effects not only one officer but many, as well as counties.

McDonald County has been delegated by the Legislature to be a county of the fourth-class (See page 1801, Laws of Missouri, 1945).

The county court is merely an agent of the county, possessing no powers except those conferred by statute. In Jenson v. Wilson Township, Gentry County, 145 S. W. (2nd) 372, 1. c. 374, the court said:

" * * * A county court is only the agent of the county with no powers except those granted and limited by law, and like all other agents, it must pursue its authority and act within the scope of its powers. State ex rel. Quincy, etc., Ry. Co., v. Harris, 96 Mo. 29, 8 S. W. 794. * * *

See also State ex rel v. Oliver, 208 S. W. 112, 202 Mo. App. 527, 1.c. 535 and 536.

Section 36, Article VI of the Constitution of Missouri, 1875, gave the county courts jurisdiction to transact all county and such other business as prescribed by law. Said section reads as follows:

"In each county there shall be a county court, which shall be a court of record, and shall have jurisdiction to transact all county and such other business as may be prescribed by law. The court shall consist of one or more judges, not exceeding three, of whom the probate judge may be one, as may be provided by law."

In view of such grant of authority, the Legislature apparently enacted what is now known as 2480, R. S. Mo. 1939, which has been in effect for many years and reads:

"The said court shall have control and management of the property, real and personal, belonging to the county, and shall have power and authority to purchase, lease or receive by donation any property, real or personal, for the use and benefit of the county; to sell and cause to be conveyed any real estate, goods or chattels belonging to the county, appropriating the proceeds of such sale to the use of the same, and to audit and settle all demands against the county."

In so far as we can determine, Section 2480, supra, has not been specifically repealed or repealed by inference or implication.

Section 7, Article VI, Constitution of Missouri, 1945, replaces Section 36, Article VI, Constitution of Missouri, 1875, and provides that the County Court shall manage all county business as prescribed by law. Section 7, Article VI, reads:

"In each county not framing and adopting its own charter or adopting an alternative form of county government, there shall be elected a county court of three members which shall manage all county business as prescribed by law, and keep an accurate record of its proceedings. The voters of any county may reduce the number of members to one or two as provided by law."

Said provision does not have the effect of repealing any statute not in conflict therewith. For instance, Section 2480, supra, in no way conflicts with Section 7, Article VI, supra, and therefore it is still in full force and effect. Neither does the stripping the county clerk of judicial powers that were formerly vested in said county (Section 1, Article V, Constitution of Missouri, 1945) take away such authority as vested in the county under Section 2480, supra.

A careful search of the statutes show that in some counties coming within certain classifications of counties other than Class 4, the county court or some person delegated by said county, is by law specifically required to do the purchasing for the various county officials. Sections 2509, 2510 and 2511, R. S. Mo. 1939, are applicable only to counties now or hereafter having not less than 70,000 inhabitants, nor more than 90,000 inhabitants as shown by the last Federal Census.

These statutes further require that supplies for county officers be contracted for by the county court, and the Legislature enacted Section 2512, R.S. Mo. 1939, which makes it a misdemeanor for violating any of the foregoing statutes. Under Section 2511, supra, no county officer may purchase any supplies not contracted for by the county without the approval of the county court, neither can any purchase be made for supplies that have not been contracted for by the county court without the approval of said court. Section 2509 reads:

"It shall be the duty of the judges of the county court in each county of this state to which this article applies annually on or before the first day of November, to determine the kind and quantity of supplies required by law to be paid for out of the county

funds, that will be necessary for the use of the several officers of such county during the next succeeding calendar year, and to advertise for sealed bids and contract with the lowest and best bidder for such supplies. But, before letting any such contract, or contracts, the court shall cause notice that it will receive sealed bids for such supplies. to be given by advertisement in some daily newspaper of general circulation published in the county, such notice to be published on Thursday of each week for three consecutive weeks, the last insertion of which shall be not less than ten days before the date in said advertisement fixed for the letting of such contract, or contracts which shall be let on the first Monday in December, or on such other day and date as the court may fix between the first Monday of December and the first Saturday after the first Monday in December, next following the publication of such notice: Provided, that if by nature thereof or the quantity of any article or thing which any county officer, in any county of this state to which this article applies that the same may not be included in such contract at a saving to such county, then and in that event, such article or thing may be purchased for such officer upon an order of the county court first being made and entered as in this article provided."

Section 2511 reads:

"It shall hereafter be unlawful for any county officer in any county to which this article applies to purchase any supplies not contracted for as in this article provided, for his official use and for which payment is by law required to be made by the county, unless he shall first apply to and obtain from the county court an order in writing and under the official seal of the court for the purchase of such supplies, and in all cases where the supplies requested by such officer have been contracted for by the county

court as in this article provided, the order shall be in the form of a requisition by said officer addressed to the person, firm, company or corporation with whom or which the county court has made a contract for such supplies, and approved by the county court."

Also, Section 2513, as amended, page 833, Laws of Missouri 1945, vests similar authority in the county court, but like Sections 2509 and 2511, supra, such provision only applies to counties of the second class.

There is one instance we have in mind and possibly there may be other similar instances wherein the Legislature has given authority, so the decisions hold, to the sheriff to purchase necessary supplies for the county jail without the necessity of going through the county court. That is under Section 9193 and 9195, R.S. Mo. 1939, which read:

Section 9193. "There shall be kept and maintained, in good and sufficient condition and repair, a common jail in each county within this state, to be located at the permanent seat of justice for such county."

Section 9195. "The sheriff of each county in this state shall have the custody, rule, keeping and charge of the jail within his county, and of all the prisoners in such jail, and may appoint a jailer under him, for whose conduct he shall be responsible; but no justice of the peace shall act as jailer, or keeper of any jail, during the time he shall act as such justice."

While the foregoing statutes do not in so many words say that the sheriff shall purchase necessary supplies for the jail, the courts have held in fact that they do authorize the jailer to purchase all necessary supplies to keep said jail in good condition. In Kansas City Sanitary Co. v. Laclede Co. 269 S.W. 395, the court said in construing Sections 12549 and 12551 which are the same as 9193 and 9195, R.S. Mo. 1939.

"Under Section 12549 the jail is required to be kept in good and sufficient condition and under Section 12551 the sheriff has the custody, keeping and charge of the jail. He, therefore, has full authority to purchase all supplies necessary to keep such jail in good and sufficient condition, which includes sanitary condition, and needed no authorization by the county court to render the county liable for purchases for such jail for such purpose. Harkreader v. Vernon County, 216 Mo. 696; 116 S. W. 523."

Applying a well established rule of statutory construction "Expression of one thing in a statute is the exclusion of another," (See Kansas City Power and Light Company v. Smith 111 S. W. (2nd). 513, 342, Mo. 75) we are confronted with conflicting conclusions if we hold the foregoing rule applicable in construing the foregoing statutes wherein county officers in certain class counties or counties having a designated number of inhabitants, must have the county court purchase the necessary supplies for their respective offices as per contract or secure the approval of the county court if supplies are purchased that are not contracted for by the county court, then all county officers not coming within such classification may purchase their own supplies. If we apply the same rule to the statute authorizing the sheriff to purchase supplies for the jail, then all other county officers not given specific statutory authority to purchase supplies must have the necessary supplies purchased through the county court.

We must not overlook Section 2480, R.S. Mo. 1939, which is still in full force and effect and which gives the county court control and management of all property, real and personal, belonging to the county, direct authority to make purchases of real and personal property for use and benefit of the county and further authority to convey real and personal property of the county.

It is likewise true that all county officers are mere creatures of statutes and possess only such authority as given by the statutes and Constitution of this state and necessary implied power to carry out such expressing statutory grant of authority. (See Lamar Township v. City of Lamar, 261 Mo. 171 l.c. 189.)

Therefore in view of the foregoing authority vested in the county court to purchase supplies for county officers under and by virtue of Section 2480, supra, in the absence of any statutory authority given any county officer to purchase the supplies for the respective office for which he was elected or appointed, it is the opinion of this department that such supplies must be purchased by the county court.

Respectfully submitted,

AUBREY R. HAMMETT, JR., Assistant Attorney General

APPROVED:

J. E. TAYLOR Attorney General

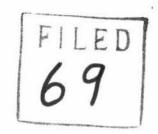
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CONSOLIDATED SCHOOLS:

The Board of Directors of a consolidated school district have full authority over all schoolslying within the area of the consolidated district.

April 20, 1949

Mr. James L. Paul Prosecuting Attorney McDonald County Pineville, Missouri



Dear Sir:

This office is in receipt of your recent request for an official opinion upon the following question:

"Where a school district was consolidated under the provisions of the consolidation act of 1909 and the consolidated district has permitted the operation of outlying schools within the consolidated area which had an enrollment of twenty or more, does the consolidated district now have the power to discontinue the operation of the outlying school and transport all the students to the central school?"

Your inquiry comprises two distinct questions, the first of which is: Where a school district was consolidated under the provisions of the Consolidation Act of 1909, and the consolidated district has permitted the operation of outlying schools, with an enrollment of twenty or more, within the consolidated area, does the consolidated district now have the power to discontinue the operation of these outlying schools? Your second question is: If the consolidated district has the power to discontinue the operation of these aforesaid outlying schools, does it have the power to transport the students of these said outlying schools to the central school?

In reply to your first question, restated by us above, I would call your attention to Section 10495, R. S. Mo. 1939, which states:

"When the resident citizens of any community desire to form a consolidated district, a petition signed by at least twenty-five qualified voters of said community shall be filed with the county superintendent of public schools.

On receipt of said petition, it shall be the duty of the county superintendent to visit said community and investigate the needs of the community and determine the exact boundaries of the proposed consolidated district. In determining these boundaries, he shall so locate the boundary lines as will in his judgment form the best possible consolidated district, having due regard also to the welfare of adjoining districts. The county superintendent of schools shall call a special meeting of all the qualified voters of the proposed consolidated district for considering the question of consolidation. He shall make this call by posting within the proposed district ten notices in public places, stating the place, time and purpose of such meeting. At least fifteen days' notice shall be given and the meeting shall commence at 2 o'clock p.m. on the date set. The county superintendent shall also post within said proposed district five plats of the proposed consolidated district at least fifteen days prior to the date of the special meeting. The plats and notices shall be posted within thirty days after the filing of the The county superintendent shall file a copy of the petition and of the plat with the county clerk and shall send or take one plat to the special meeting. The special meeting shall be called to order by the county superintendent of schools or someone deputized by him to call said meeting to order. meeting shall then elect a chairman and a secretary and proceed in accordance with section 10467, R. S. 1939. The proceedings of this meeting shall be certified by the chairman and the secretary to the county clerk or clerks and also to the county superintendent of schools of all the counties affected. If the proposed consolidated district includes territory lying in two or more counties, the petition herein provided for shall be filed with the county superintendent of that county in which the majority of the petitioners reside. The county superintendent shall proceed as above set forth and in addition shall file a copy of the petition and of the plat with the county clerk of each county from which territory is proposed to be taken: Provided, that all plats and notices

posted as required in this section shall not be filed or posted unless approved and signed by the county superintendent of all counties in which any part of such proposed district shall lie: Provided further, that should any county superintendent fail or refuse to sign all plats and notices as required in this section, the case may be appealed to the state superintendent by any other county superintendent interested and the decision of the state superintendent shall be final."

We would call your further attention to 10498, R. S. Mo. 1939, which states:

"Whenever any consolidated district is organized under the provisions of this article, the original districts shall continue until June 30th, following the organization of said consolidated district, and at that time all the property, money on hand, books and papers of the school districts whose schoolhouse sites are included within said consolidated district shall be the officers of aforesaid districts be turned over to the board of directors of the consolidated district, and also all bonds outstanding against the aforesaid districts shall become debts against the consolidated district. The division of property and money on hand in case school districts are divided by the formation of any consolidated district shall be governed by sections 10413 and 10414."

You will note that the above quoted section states that whenever a consolidated district is organized under the provisions of Section 10495, quoted above, that the original districts comprised within the consolidated district shall continue until June 30 following the organization of said consolidated district, at which time all of the property, money on hand, books and papers of the school districts, whose schoolhouse sites are included within said consolidated district, shall, by the officers of the aforesaid district, be turned over to the board of directors of the consolidated district. This section has been sustained in the case of State ex rel. Smith et al. v. Gardner, et al., 204 S.W. (2d) 319, 1.c. 321, which states:

"It will be seen from the above quotation that after the consolidated district is organized, that it is the plain duty of the common school

districts absorbed by the consolidated district to turn over to the latter all property, money on hand, books and papers of their respective districts. They have no discretion in this matter. Theirs is a ministerial duty."

We would also call your attention to the case of State v. Board of Education of Consolidated School District No. 1, 21 S.W. (2d) 645, 1.c. 649, which states:

"It is claimed by the relators that to permit the closing of the two schools in question by the directors would be permitting, in effect, the board to move a school without the consent of the voters of the district. However, if it can be said that such is the effect of their action, it would make no difference for the reason that it is well settled that the board can move a school in a consolidated district without the consent of the voters. Velton v. School District (Mo. App.) 6 S.W.(2d) 652; Gladney v. Gibson, 208 Mo. App. 70, 233 S.W. 271."

From the above we deduce that following consolidation the board of directors of the consolidated district possess complete authority over all school property, money and school matters within the area of the consolidated district. In your case it appears that the board of directors of the consolidated area may not have, following the fact of consolidation, chosen to exercise all of the authority which had become vested in them by virtue of the consolidation and their election to the board of directors, to the extent that they permitted the continued function of some schools within the consolidated area independently of the direction of the board of directors of the consolidated district. It is the opinion of this office that the board of directors may assert this authority at any time subsequent to its investment in them, and that this authority comprises the power to close any school within the consolidated area, provided they comply with Section 10496, R. S. Mo. 1939, which section will be considered in our discussion of your second question.

Your second inquiry restated by us is: If the consolidated district has the power to discontinue the operation of these aforesaid outlying schools, does it have the power to transport the students of these said outlying schools to the central school?

In this case we would call your attention to Section 10496, R. S. Mo. 1939, which states:

"The question of transportation of pupils may be voted upon at the special meeting above provided for, if notice is given that such a vote will be taken. If transportation is not provided for in any school district formed under the provisions of sections 10493 to 10500, inclusive, it shall then be the duty of the board of directors to maintain an elementary school within three and one-half miles by the nearest traveled road of the home of every child of school age within said school district: Provided, transportation of pupils or the maintenance of elementary schools within three miles and a half of each child of school age in the district shall not be required in consolidated districts now or hereafter organized under the provisions of sections 10493 and 10500, inclusive, where such consolidation has not placed said children further from an elementary school than they were prior to said consolidation: however, no transportation shall be furnished if there be any school within three and one-half miles of such pupil but assignment shall be made as provided by Section 10461: Provided further, that when the average attendance in any elementary school for any month falls below ten, the school board shall have authority to close such elementary school for the remainder of the term and provide transportation for the pupils of such elementary school to some other elementary school or schools in said district. Such transportation shall be paid for out of the incidental funds of the district: Provided further, that if transportation is not provided for, any consolidated district may, by a majority vote at any annual or special meeting, decide to have all the seventh and eighth grade work done at the central high school building: Provided, fifteen days' notice has been given that such vote will be taken. seventh and eighth grade work at the central high school may be discontinued at any time by a majority vote taken at any annual or special meeting."

From the above it will be seen that the board of directors may, when the average attendance in any elementary school for any month falls below ten, provide transportation for the pupils of such elementary school to the central school.

We would call your further attention to section 10326, R. S.

Mo. 1939, which states:

"Whenever the board of directors of any school district or board of education of a consolidated district shall deem it advisable, or when they shall be requested by a petition of ten taxpayers of such district, to provide for the free transportation to and from school, at the expense of the district, of pupils living more than one-half mile from the schoolhouse, for the whole or for part of the school year, said board of directors or board of education shall submit to the qualified voters of such school district, who are taxpayers in such district, at an annual meeting or a special meeting, called and held for that purpose, the question of providing such transportation for the pupils of such school district: Provided, that when a special meeting is called for this purpose, a due notice of such meeting shall be given as provided for in Section 10361. If two-thirds of the voters, who are taxpayers, voting at such election, shall vote in favor of such transportation of pupils of said school district, the board of directors or board of education shall arrange for and provide such transportation. The board of directors or board of education shall have authority and are empowered to make all needful rules and regulations for the free transportation of pupils herein provided for, and are authorized to and shall require from every person, employed for that purpose, a reasonable bond for the faithful discharge of his duties, as prescribed by the board. Said board of directors or board of education shall pay by warrant the expenses of such transportation out of the incidental fund of the district: Provided, that this section shall include pupils attending private schools of elementary and high school grade except such schools as are operated for profit."

It is the opinion of this office that when the number of pupils in average attendance at any elementary school within the consolidated area falls below the average of ten for any month, that the board of directors of the consolidated district shall have authority to provide transportation for the pupils of this school to the consolidated school.

It is our further opinion that whenever the board of directors of a consolidated district shall deem it advisable, or when they shall be requested by a petition of ten taxpayers of such district

to provide for the free transportation to and from school, of all pupils within the district, said board of directors shall submit to the qualified voters of such consolidated district, at an annual or special meeting, the question of providing such transportation, and that if two-thirds of the voters, who are taxpayers, who vote at such election, shall vote in favor of providing such transportation, the board of directors shall arrange for such transportation.

CONCLUSION

It is the conclusion of this office that the board of directors of a consolidated district have the power to close schools lying within the area of the consolidated district.

It is the further conclusion of the office that when the number of pupils in average attendance at any elementary school within the consolidated area falls below the average of ten for any month, that the board of directors of the consolidated district shall have authority to provide transportation for the pupils of this school to the consolidated school.

It is the further conclusion of this office that whenever the board of directors of a consolidated district shall deem it advisable, or when they shall be requested by a petition of ten taxpayers of such district to provide for the free transportation to and from school, of all pupils within the district, said board of directors shall submit to the qualified voters of such consolidated district, at an annual or special meeting, the question of providing such transportation, and that if two-thirds of the voters, who are taxpayers, who vote at such election shall vote in favor of providing such transportation, the board of directors shall arrange for such transportation.

Respectfully submitted,

HUGH P. WILLIAMSON Assistant Attorney General

APPROVED:

J. E. TAYLOR Attorney General

HPW: mw

CONSERVATION COMMISSION:

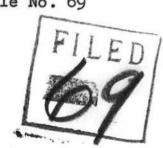
FISH AND GAME PERMITS:

Necessary that persons secure fishing permits before fishing in private waters in this state.

File No. 69

July 23, 1949

Honorable James L. Paul Prosecuting Attorney McDonald County Pineville, Missouri



Dear Sir:

This will acknowledge receipt of your request for an opinion which reads:

"Please furnish this office with an opinion on the following facts:

"'Does a person who owns a private lake which is not fed by spring or streams but by an artesian well drilled at the owner's expense and upon these premises, no state money or state property has been used have to require the purchase of Missouri fishing license in order to permit patrons to fish in said private lake?'

"I am acquainted with the case of State of Missouri -vs- Taylor which was decided by the Supreme Court of Missouri in September, 1948, in which they hold that the wildlife of the State of Missouri is property of the State of Missouri, and by reason thereof the Wildlife and Forestry Commission can require the purchase of licenses before persons can fish in private owned, operated, and controlled lakes.

"It would seem to me that in the particular instance cited above that where the person owning the real-estate involved obtains his water supply for said lake from sources that in no wise come under the control of the State of Missouri and are wholly within the confines of the real-estate owned by said person, and where there has been no state aid or any part of the state employed or used that it is an extraordinary power that would require the purchase of fishing license before a person could fish in said private lake.

"The owner has, of course, obtained the necessary operating permits and has in all ways complied with operation requirements and regulations, but the question of the individual license has come up and has caused a considerable amount of confusion."

From facts stated in your request we are assuming that the proprietor of said private pond or lake now holds a wildlife breeders permit under Sections 46(b) and 52 of the Wildlife Code of Missouri 1949. If such be the case, then by issuing said permit, at least by inference, the Conservation Commission is conceding that wildlife in such body of water was obtained from a source other than the wild stock in this state, as that is one prerequisite for issuing said permit. Sections 46(b) and 52, supra, read:

"Section 46(b)-To maintain and operate a wildlife farm, wildlife exhibit or a commercial lake and to exercise the privileges of a wildlife breeder as herein permitted; upon the payment of a wildlife breeder's permit fee of ten dollars (\$10.00); provided, that a commercial lake may be maintained and operated without such permit if fish are taken only within the seasons, limits, methods and conditions herein prescribed for the waters of this state. Such permit fee may be waived if the wildlife is held for scientific, educational or propagation purposes under the direction of the Commission or is held in a public zoo operated by a public agency."

"Section 52 - Wildlife may be propagated and held in captivity by the holder of a wildlife breeder's permit, as provided herein. Such permit may be granted after satisfactory proof by the applicant that all such wildlife was secured from a source other than the wild stock in this state, and that the applicant is equipped to confine such wildlife for public safety and to prevent wildlife of the state from becoming a part of the enterprise; but such proof may be waived in the renewal of any such permits. Wildlife so propagated and held may be used, sold, given away, transported or shipped at any time, but the same shall be accompanied by a written statement by the permittee giving his permit number and showing truly the kind and number of each species sold, given away, transported or shipped, the name and address of the recipient, and that as to the same he has fully complied with his code; provided, that no person other than a wildlife breeder or his bona fide employee may take any wildlife under the provisions of this section without having on his person the hunting or fishing permit

required by this code for the taking of wildlife. Wildlife propagated in captivity or transported into this state may be liberated to the wild only under the specific permission and supervision of the Commission. The operation of any such enterprise in violation of this code or in any manner as a cloak or guise to nullify or make difficult the enforcement of this code shall be cause for the suspension or revocation of such permit."

The law seems to be very well established in this state as well as others that if said waters are subject to overflow into any public waters of the state even though it happen only occasionally, then anyone taking fish therefrom must first secure a fishing permit. However, a much closer question is presented here where the body of water is at no time subject to floods or overflow by or into public waters. We find the following principle of law in Vol. 22, American Jurisprudence, Section 44, page 699, which reads in part:

"* * * A closed season may be established, and the catching of the fish by certain methods may be forbidden, by regulations which are applicable to private, as well as to public, waters. Like-wise, a prohibition of the sale of fish during a closed season may apply to privately owned ponds and to fish privately propagated therein. The rule is different where there is no means by which fish can escape from the waters of a private owner; in such a case, he is thought to be the absolute owner of the fish while they are uncaught, * * *"

The 63rd General Assembly to some extent followed former statutory enactments in declaring the ownership of wildlife to be in the State of Missouri, however, we believe it is much broader than the former enactment. Section 8971.4, Mo. R.S.A. reads:

"The ownership of and title to all wildlife of and within the state, whether resident, migratory or imported, dead or alive, are hereby declared to be in the state of Missouri. Any person who fails to comply with or who violates this Act or any such rules and regulations shall not acquire or enforce any title, ownership or possessory right in any such wildlife; and any person who pursues, takes, kills, possesses or disposes of any such wildlife or attempts to do so, shall be deemed to consent that the title of said wildlife shall be and remain in the state of Missouri, for the purpose of control, management, restoration, conservation and regulation thereof."

There are decisions in other states holding that under a similar statement of facts as presented in your request, that the state would have no right to require persons fishing therein, at the proprietor's invitation, to comply with the laws and regulations by first obtaining a fishing permit. (See Graves v. Dunlap, 1917 B Ann. Cases, 945, 1.c. 952, 953, 954, 955 and 966, also Territory of Hawaii v. Hoy Chong, 1915A Ann. Cases, 1155-59 inclusive, and notes thereunder.) However, in view of former decisions in this state and a very recent one handed down by the Supreme Court, State v. Taylor 214 S.W. (2nd) 34, we are inclined to be of the opinion, that the state under such facts, still holds title to said fish for the purpose of regulation and may require persons fishing in such waters to first secure a fishing permit.

In State v. Taylor, supra, a person was caught dynamiting fish in a private pond. It so happened that the individual was not the proprietor of said pond neither had he secured the permission to dynamite said fish and therefore he was more or less a trespasser. The court in that case held that the ownership of fish while they are in a state of freedom is in the state not as a proprietor but in its sovereign capacity as the representative and for the benefit of all the people in common. The court further said: "We agree with appellant that 'title to fish reduced to one's possession by lawful means is released by the state to the taker,' but it does not follow that fish even in a private pond have been so reduced to possession as to vest unqualified title to them in the owner of the pond and thereby destroy all regulatory power of the State. * * *"
Which is indicative that the court leans toward the view that the state is not deprived of regulatory power over fish in private waters.

In State v. Willers, 130 S. W. (2nd) 256, the court specifically holds that absolute ownership of wild birds is in the State of Missouri and not subject to private ownership. In so holding the court said:

"Of course, the statute protects only wild birds. The absolute ownership of wild birds is in the State. They are not subject to private ownership. The Legislature may pass such laws granting to individuals the right to kill such birds at such times, or prohibit the killing of them altogether, as the Legislature may deem best."

In State v. Heger, 93 S.W. 252, 194 Mo. 707, 1.c. 711 the court said:

"The authorities are uniform in holding that the absolute ownership of wild game is vested in the people of the State, and that such is not the subject of private ownership. As no person has in such game any property rights to be affected, it follows that the Legislature, as the representative of the people of the State, and clothed by them with authority to make laws, may grant to individuals the right to hunt and kill game at such times, and upon such terms, and under such restrictions as it may see proper, or prohibit it altogether, as the Legislature may deem best. (Haggerty v. Ice Mfg. & Storage Co., 143 Mo. 238; Geer v. State of Connecticut, 161 U.S. 519; American Express Co. v. People, 133 Ill. 649; Ex parte Maier, 103 Cal. 476; State v. Rodman,

58 Minn. 393; Magner v. People, 97 III. 320; Phelps v. Racey, 60 N. Y. 10.)"

(Also on the same page is a similar quotation for Geer v. Connecticut, 161 U. S. 519, 16 Sup. Ct. 600, 40 L. Ed. 793, which case is so often referred to in decisions of this kind as authority. See also State v. Bennett, 315 Mo. 1267.)

In State v. Weber, 205 Mo. 36, the defendant was found guilty and punishment assessed at a fine of \$25. The defendant appealed from said judgment. There was in effect at the time the foregoing decision was rendered the following provision of the Game and Fish Act which reads in part:

"'Sec. 1. The ownership of and title to all birds, fish and game in the State of Missouri, not held by private ownership, legally acquired, is hereby declared to be in the State, and no fish, birds or game shall be caught, taken or killed in any manner or at any time, or had in possession except the person so catching, taking or killing or having in possession shall consent that the title to said fish, birds and game shall be and remain in the State of Missouri for the purpose of regulating and controlling the use and disposition of the same after such catching, taking or killing.* * *!"

"'Sec. 13. It is hereby declared unlawful to kill or attempt to kill any deer in the State of Missouri under one year of age. * * * It is also declared unlawful for any person to wound, kill or capture any deer in the waters of the streams, ponds or lakes within the jurisdiction of this State, or to have in possession or transport at any time the carcass of any deer, or any portion of such carcass, unless the same has thereon the natural evidence of its sex. Any person violating the provisions of this section shall be punished by a fine of not less than twenty-five dollars nor more than one hundred dollars."

The evidence in the above case was that the defendant had in his possession and was offering for sale at his meat market in Kansas City, Missouri, the carcasses of several deer from which the natural evidence of sex had been removed. The evidence further discloses that the deer in question were fawned and raised in captivity on a Henry County, Missouri, stock farm owned by a Mrs. Casey. Said deer were killed there and their carcasses were shipped to the defendant in Kansas City, Missouri. The deer came from a herd raised on said farm descended from a pair of tame deer which were raised as pets on the Casey farm some 25 years

prior thereto. Said deer were kept in a pasture, allowed to run with cattle, all enclosed by a high fence. They were fed and cared for just like the cattle, said enclosure was never maintained as a game preserve nor were the deer raised or used for hunting purposes. A number of deer were killed each year during the holiday season and shipped to the defendant for sale at defendant's meat market. The defendant contended that the deer in question were not game animals and therefore did not come in the purview of game law.

The court held that the deer in question came within the meaning of the term 'game' and said:

"As we have said, the deer in question come within the meaning of the term 'game,' which means animals ferae naturae, or wild by nature. It makes no difference that said deer were raised in captivity and had become tame, they are naturally wild. 'There is no property in wild animals until they have been subjected to the control of man. If one secures and tames them they are his property; if he does not tame them, they are still his so long as they are kept confined and under his control.' (Cooley on Torts (2 Ed.), 435; Manning v. Mitcherson, 69 Ga. 447; Amory v. Flyn, 10 Johns. 102; Com. v. Chace, 9 Pick. 15) That deer are animals ferae naturae is held by all the authorities and disputed by none.

The court further held that the defendant's ownership in said deer was such private ownership as is recognized in Section 1 of the Act but that deer is game within the meaning of the Act and Mrs. Casey had a right to sell and deliver said deer the same as any other personal property. However, the Legislature could enact legislation to preserve and protect such game and therefore the property rights of the defendant were not infringed.

In State v. Weber, supra, many cases are cited showing that under the police power of the state, the legislature can go almost as far toward regulating wildlife as it may do in the regulation of intoxicating liquors. While we do not want to burden this opinion with any unnecessary quotations, we do feel that it will be enlightening to at least include some remarks of the court in State v. Weber, supra. The court in its decision said:

"No owner of deer raised in captivity has a better title thereto than has the hunter at common law to the deer captured or killed by him, and it has always been held that the State has authority to regulate the sale of such game, or prohibit it altogether. In Commonwealth v. Gilbert, 160 Mass. 157, it is said: 'In order to make the protection

of the trout more effectual, it was deemed necessary by the Legislature to punish the sale, during the close season, of all trout except those which are alive. This was probably on account of the difficulty in distinguishing between trout which had been artificially propagated or maintained and other trout. On the construction contended for by the defendant, the law could not be so well enforced.' In People ex rel. Hill v. Hesterberg, 184 N.Y. 126, the court says: 'To the argument that the exclusion of foreign game in no way tends to the preservation of domestic game, it is sufficient to say that substantially the uniform belief of legislatures and the people is to the contrary, and that both in England and many of the States in this country legislation prohibiting the possession of foreign game during the close season has been upheld as being necessary to the protection of domestic game, on the ground that without such inhibition or restriction any law for the protection of domestic game could be successfully evaded; 'citing Whitehead v. Smithers, L. R. (2 C.P. Div.) 553; Ex parte Maier, 103 Cal. 476; Mayner v. People, 97 Ill. 320; State v. Randolph, 1 Mo. App. 15; Stevens v. State, 89 Md. 669; Roth v. State, 51 Ohio St. 209; Commonwealth v. Savage, 155 Mass. 278."

The court quoted approvingly from another decision as follows:

"* * * The Legislature may forbid the catching or selling of useful fishes during reasonable close seasons established for them; and to extend the prohibition so as to include such as have been artificially propagated or maintained is not different in principle from legislation forbidding persons from catching fish in streams running through their own lands. The statute under consideration falls within this power."

The court in State v. Weber held that there can be no doubt as to the constitutionality of Section 13 of said Act and held that so far as the constitutionality is involved that it differs in no material respect to many decisions specifically referred to, which hold that game imported notwithstanding same is the private property of the taker under the police power of the State, certain uses of private property may be prohibited for the welfare of the public and for better protection of game in this state. In conclusion the court said:

"If the provision of section 13, which declares it unlawful to have in possession the carcass of any deer which has not thereon the natural evidence of its sex, should be construed as referring to deer in a wild state, and to such only, the evasion of the law would be an easy matter. Suppose the deer which defendant purchased and had in possession had been killed while in a wild state, there is no doubt that, the evidence of sex being removed, he would be guilty of a violation of the law; and, so far as the question of title or ownership is concerned, the title which a person holds to deer which he has raised and kept in captivity is no better than his title to the wild deer which he kills or captures, and reduces to his possession."

We think what has been said hereinabove in State v. Weber regarding the deer shipped to the market is likewise applicable to the regulation by the state of fish propagated and kept in this private body of water as related in your request, only now the statute enacted by the 63rd General Assembly vested ownership of all wildlife in the State of Missouri is much broader than the one that was in effect when the foregoing decision was rendered. In that decision, Section 1 of the Act "The ownership of and title to all birds, fish and game in the State of Missouri, not held by private ownership legally acquired, is hereby declared to be in the State, * * *" While the present statute 8971.4, Mo. R.S.A., reads in part: "The ownership of and title to all wildlife of and within this state, whether resident, migratory or imported, dead or alive, are hereby declared to be in the state of Missouri. * * *" and "* * *said wildlife shall be and remain in the State of Missouri, for the purpose of control, management, restoration, conservation and regulation thereof.

CONCLUSION

Therefore, while there is some authority to support the contention that the state cannot require persons to obtain fishing permits before fishing in said body of water, the greater weight of authority especially in this state, is that title remains in the State of Missouri to all wildlife for the purpose of control, management, restoration, conservation and

regulation of such wildlife and this is true of all wildlife regardless of whether same is imported dead or alive or has been reduced to so-called private ownership. In view of the foregoing, our conclusion must be in the affirmative, that it is necessary for persons desiring to fish in said private waters to first obtain a fishing permit as provided in the Wildlife Code, State of Missouri, 1949.

Respectfully submitted,

AUBREY R. HAMMETT, JR. Assistant Attorney General

APPROVED:

J. E. TAYLOR ATTORNEY GENERAL

ARH: nm

DIVISION OF WELFARE: RESIDENCE OF DEPENDENT CHILDREN:

To establish residence requires actual bodily presence in this state for one year combined with intention of remaining permanently or indefinitely, but continuous bodily presence is not (required if residence had

December 30, 1949

been previously established in this state.

Honorable James L. Paul Prosecuting Attorney FILED 69

1/3/50

Dear Sir:

McDonald County Pineville, Missouri

I.

We hereby acknowledge a request for an opinion from this office upon the following question:

Does the residence requirement pertaining to aid for dependent children require actual physical residence within the State of Missouri for one whole year preceding the filing of an application?

II.

The 65th General Assembly of this state enacted Senate Bill No. 68, which repealed Section 9408, R. S. Mo. 1939, relating to and prescribing eligibility requirements for aid to dependent children benefits and enacted in lieu thereof two new sections relating to the same subject matter to be known as Sections 9408 and 9408a.

This section, 9408, as now in effect, provides:

"Aid to dependent children shall be granted to a parent or other relative as herein specified for the benefit of any child who:

(We have here omitted subsections 1 and 2 of Senate Bill No. 68)

"(3) has resided in the state for one year immediately preceding the application for benefits, or who was born within the state within one year immediately preceding the application and whose mother has resided in the state for one year immediately preceding the birth."

When the young lady mentioned in your letter applied for aid for her dependent children one of the questions that the Division of Welfare had to decide was whether or not the child had been a resident of the State of Missouri for one year, that is, 365 days, immediately preceding the application for benefits; or if the child had been born within one year immediately preceding the application; or whether the mother of the child had resided in the state for one year immediately preceding the birth of the child. The question of residence is one of fact, which is often difficult to determine, and each case must be determined upon its own individual set of facts. This office can only give the general rule of law to be followed in determining the question of residence.

Section 655, R. S. Mo. 1939, provides:

"The construction of all statutes of this state shall be by the following additional rules unless such construction be plainly repugnant to the intent of the Legislature or of the context of the same statute:

* * *seventeenth, the place where the family of any person shall permanently reside in this state, and the place where any person having no family shall generally lodge, shall be deemed the place of residence of such person or persons, respectively."

This statute does not clearly state the rules or facts necessary to establish residence in the State of Missouri.

The Supreme Court of Missouri in the case of State v. Wiley, 160 S.W.(2d) 677, 1.c. 686, 349 Mo. 239, considers the question of whether or not Wiley had established residence in DeKalb county for one year so as to be qualified to serve as prosecuting attorney of that county in this state. The court said that the evidence in this case showed no more than a future intention to locate in DeKalb County and that such intention was unaccompanied by any present acts or conduct evidencing a present intention to establish residence. The court said:

"* * *In none of the cases relied upon does the court indicate that intention, separate and apart from actual presence, to-wit, staying or abiding, controls. On the other hand the authorities indicate that, when one claims to have established a new residence, there must be a concurrence of physical acts evidencing such intent, such as physical presence or actual habitation in the place claimed as the place of residence, and the present intention evidenced by conduct or

utterances there to remain indefinitely, or for a fixed time and then and there to establish residence.

"(8) We hold that respondent Wiley was not a bona fide resident of DeKalb County for twelve months immediately preceding the general election held on November 5, 1940. * * *"

This case is cited with approval by the Supreme Court in the case of State v. McKittrick, 185 S.W.(2d) 17, 1.c. 21, 353 Me. 900.

Section 1517, R. S. Mo. 1939, provides that:

"No person shall be entitled to a divorce from the bonds of matrimony who has not resided within the state one whole year next before filing of the petition, unless the offense or injury complained of was committed within this state or whilst one or both of the parties resided within this state."

A leading case construing this residence requirement is Barth v. Barth, 189 S.W. (2d) 451, in which the St. Louis Court of Appeals said:

"To create a residence in a particular place two fundamental elements are essential. These are actual bodily presence in the place, combined with a freely exercised intention of remaining there permanently, or for an indefinite time. Whenever these two elements combine a residence is created. Neither bodily presence alone nor intention alone will suffice to create a residence. Both must concur, and at the very moment they do concur a residence is created. The length of the period of bodily presence, however short, is of no consequence, provided the concurring intention is established by other evidence. Otherwise it may become an important fact for consideration in determining the existence or not of the intention. The residence of a soldier in the military service of his country generally remains unchanged though he may be temporarily stationed in the line of duty at a particular place, even for a

period of years. This is so because he acts under military orders, and not of his own volition. He may, however, acquire a new residence if both the fact and the intention concur. Trigg v. Trigg, 226 Mo. App. 284, 41 S.W.(2d) 583; Matthews v. Matthews, 224 Mo. App. 1075, 34 S.W.(2d) 518; Bradshaw v. Bradshaw, Mo. App., 166 S.W.(2d) 805; Nolker v. Nolker, Mo. Sup., 257 S.W. 798; State ex rel. Taubman v. Davis, 199 Mo. App. 439, 203 S.W. 654; Finley v. Finley, Mo. App., 6 S.W.(2d) 1006; Dorrance v. Dorrance, 242 Mo. 625, 148 S.W. 94."

We believe that this case clearly states the rule in Missouri as to the requirements to create a residence in this state, and that this case and the Wiley case would be followed by the courts in construing the provision for residence stated above in Section 9408, as enacted by the recent 65th General Assembly.

Your subsequent letter of December 16th carries additional facts in regard to your question and from this letter I assume that the mother of the child was a resident of McDonald county and the State of Missouri prior to her marriage and for a short time after her marriage as defined by the above cases and the statute cited; that during the past three years said mother would come back to your county and stay with her parents for two or three weeks at a time; that she and her husband did not establish a permanent residence in any other state and that she had no intention of remaining away from your county and this state permanently or for an indefinite time, and that she has actually been present in this state since June, 1949.

The leading case on the question of maintaining an established residence in this state is Trigg v. Trigg, 41 S.W.(2d) 583. In this case an army officer filed suit for a divorce in Kansas City, Missouri, where he had established residence in 1917, and thereafter was sent by the United States Army to various army posts in the United States where he lived with his wife until their separation in 1929. His wife contested the divorce on the ground that he had not been a resident of the state of Missouri one whole year next before the petition for divorce was filed. The divorce petition was filed in October, 1929. He had not been in Kansas City for three years prior to the filing of the divorce petition. The court held:

"The injury complained of was not committed within this state, and the plaintiff was required to allege and prove that he had resided within the state the required time.

* * * * * *

"There is no evidence of an intent or act on the part of plaintiff to change his residence after it was re-established in Kansas City, and before the institution of this action."

The defendant contended that because of the absence of the plaintiff from the state, plaintiff was not a resident of the state as commonly understood but that the statute requires the actual bodily and physical presence of the plaintiff within the state for one whole year before the suit is instituted.

The court further said:

"* * *We cannot agree that such is the law, but interpret the section of the statute in question to mean that if a person has become a resident of the state and remains so without change for the required period he does not lose his right of action for divorce merely because he was not physically present continuously within the state one whole year before filing a petition. * * *Residence is neither gained nor lost by merely crossing the state line. * * *

"We hold in accord with the general expression of the law that residence is largely a matter of intention evidenced by some act or acts in conformity with such intention, and that a residence once established within this state and not thereafter changed is sufficient for the maintenance of a divorce action, notwithstanding the physical absence of the resident for a short or long period. In the case of an army officer it would be peculiarly arbitrary and unjust to deny him the right accorded any other citizen merely because of his physical absence from the state in the performance of his duty as a soldier. His absence is not of his own volition, but is occasioned by necessary obedience

to martial orders. The continuity of residence is not broken by a mere bodily absence from the state. Appellant says that no case has been found where the facts are exactly like the ones involved here. Residence involves a question of fact controlled mainly by intention. The trial court determined this question upon substantial proof and we see no reason to interfere with the finding made. The following authorities support the conclusions which we have reached and stated above: State ex rel. v. Shepherd, 218 Mo. 656, 666, 117 S.W. 1169, 131 Am. St. Rep. 568; Humphrey v. Humphrey, 115 Mo. App. 361, 363, 91 S.W. 405, and cases cited; In re Kalpachnikoff (D.C.) 28 F. (2d) 288; Ex parte White (D.C.) s. W. 405; 228 Fed. 88; Ruling Case Law, Vol. 9, page 551; Harris v. Harris, 205 Iowa, 108, 215 N.W. 661; Stevens v. Allen, 139 La. 658, 71 So. 936, L.R.A. 1916E, 1115; Johnston v. Benton, 73 Cal. App. 565, 239 P. 60; Pendleton v. Pendleton, 109 Kan. 600, 201 P. 62; Walton v. Walton (Mo. App.) 6 S.W. (2d) 1025; Nolker v. Nolker (Mo. Sup.) 257 S.W. 798. The plea to the jurisdiction was properly denied."

The case of Bradshaw v. Bradshaw, 166 S.W. (2d) 805, follows the Trigg v. Trigg case, supra, and supports the holding therein as to the elements necessary to maintain a residence once established in this state.

In the case of Lewis v. Lewis, 176 S.W. (2d) 556, the question of whether the plaintiff in a divorce action had been a resident of Harrison county, Missouri, for one whole year next before filing the divorce petition was considered. The plaintiff in this case had established his residence in that county before his marriage and then lived in other states while he was a member of the United States Air Force and while in the Diplomatic Service of the United States. The plaintiff from 1919 until 1942 had not actually lived in Harrison county, Missouri. The court held that if his domicile or residence was actually in Missouri prior to his marriage then a declaration on his marriage application that he was a resident of California would not be sufficient to establish California as his domicile and that physical absence from this state for a period of more than twenty years, under circumstances here shown, is not alone sufficient to deprive one of a residence once established. The court cited Trigg v. Trigg, supra, and followed this case on the question of losing an established residence in this state.

III.

CONCLUSION

It is, therefore, the opinion of this office that to establish residence as required in Section 9408, as enacted by Senate Bill No. 68 of the 65th General Assembly, requires actual bodily presence in this state for a period of one year immediately preceding the application for benefits, combined with a freely exercised intention of remaining here permanently or for an indefinite time, and a dependent child or parent of such a child could not live outside the State of Missouri during the period of one year immediately preceding the application for benefits unless residence in this state had been previously established.

If the applicant for benefits had an established residence in this state and did not establish a residence in another state then it would not be necessary for the applicant to be physically present within this state continually during the previous year before making the application for benefits.

Respectfully submitted,

STEPEHN J. MILLETT Assistant Attorney General

APPROVED:

J. E. TAYLOR Attorney General

SJM:mw

SCHOOLS:

Board of directors of common school district empowered to act until completion of organization of reorganized district.

SCHOOL DISTRICTS:

July 22, 1949

8/1/49

Honorable Hugh Phillips Prosecuting Attorney Camden County Camdenton, Missouri



Dear Sir:

Reference is made to your request for an official opinion of this office, reading as follows:

"I am seeking an opinion from your office on the following proposition.

"Laws of Missouri, 1947, Vol. II, Pages 370-377 relates to County Reorganization Boards, State School Reorganization Plan. Approval of Camden County Plan was had by State Department of Education and also approval for all except one district on July 12, 1949. However this rejected district is not involved in my questions.

"Section 11 of said law provides: 'The terms of office of all school directors and officers of the various school districts comprising the territory incorporated in such enlarged school districts SHALL CHASE UPON THE ADOPTION OF THE PLAN OF REORGANIZATION AND THE ORGANIZATION OF THE BOARD OF DIRECTORS, and such officers shall deliver to the board of directors of the enlarged school district all property, records, books and papers belonging to such component districts....' (Emphasis mine).

"As now planned there will be election in each of the new reorganized districts in August, 1949, for selection of new six person board.

"County Treasurer is now faced with following proposition: She has been presented with Warrant on common school district taken over in enlarged reorganized district, which warrant is dated July 15, 1949, and is valid on its face in all respects.

"QUESTION: Do the terms of office and authority thereunder of school boards comprising the new reorganized district cease upon Election of Adoption and Approval of Reorganization (July 12, 1949) or must both election and subsequent election of new directors and their organization with choosing of new treasurer be accomplished before term of office shall cease?"

The act referred to in your letter of inquiry, found Laws of Missouri, 1947, Volume II, pages 370 to 377 inclusive, provides a comprehensive scheme for the reorganization of the various school districts in the several counties of the state. Generally speaking, it may be said that the matter involves the submission of the proposed plan of reorganization to the electorate, and upon a favorable vote being had upon the proposed plan, the subsequent organization of the reorganized districts after an election of directors and selection of officers.

Section 11 of the act, insofar as material to the determination of your question, reads as follows:

"The terms of office of all school directors and officers of the various school districts comprising the territory incorporated in such enlarged school districts shall cease upon the adoption of the plan of reorganization and the organization of the board of directors, and such officers shall deliver to the board of directors of the enlarged school district all property, records, books and papers belonging to such component districts. All funds in the hands of the county or township treasurer to the credit of the various districts composing such enlarged district, shall be immediately transferred to the credit of the treasurer of such enlarged district. * * * * "

(Emphasis ours.)

We note that the election approving the plan of reorganization for Camden County was held on July 12, 1949, the proposed plan receiving a majority vote. We further note that the election for the selection of the directors for the new enlarged district has not as yet been held. This election, under the provisions of Section 10 of the act must be held within 30 days after the first election approving the plan of reorganization. It is further noted that the county treasurer, as custodian of the school funds of the common school districts, has been presented for payment a warrant dated July 15, 1949, such date being subsequent to the date of the first election approving the plan of reorganization but prior to the date of election of the directors of the new enlarged district. The answer to your question then depends upon a construction to be accorded the quoted provision of Section 11 of the act.

You will note that the terms of office of the school directors and officers of the various school districts are under the statute terminated upon the adoption of the plan of reorganization and the organization of the board of directors. The "board of directors" referred to in the statute can of necessity only refer to the directors of the enlarged district. To construe the provision otherwise would result in an absurdity. It therefore appears that until such time as both of these conditions are met, the various school directors of the common school districts taken into the enlarged new district retain their status as public officials and are empowered to continue to deal with the fiscal affairs and property of their respective common school districts as formerly.

Further, you will note that it is not until such time as the board of directors of the newly enlarged district shall have selected a treasurer is there to be any transfer of funds to such district. This appears from the last sentence of the section quoted supra. This, of course, could not be done until the newly elected directors shall have qualified and organized.

CONCLUSION

In the premises, we are of the opinion that the board of directors of a common school district is empowered to continue the control of the fiscal affairs and property of such common school district until such time as said common school district

Hon. Hugh Phillips

may be taken into an enlarged district under the plan of reorganization provided by Laws of Missouri, 1947, Volume II, pages 370 to 377, inclusive, and that such power continues until the election and qualification of the new board of directors of such enlarged district.

We are further of the opinion that a warrant issued by the board of directors of a common school district, subsequent to the adoption of the plan of reorganization but prior to the election and qualification of the board of directors of the new enlarged district, should be accepted and paid by the county or township treasurer as the case may be.

Respectfully submitted,

WILL F. BERRY, JR. Assistant Attorney General

APPROVED:

J. E. TAYLOR Attorney General

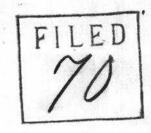
WFB: VLM

SCHOOLS) Yax rate applicable in reorganized school districts.

September 10, 1949

9/11/49

Honorable John P. Peters Prosecuting Attorney Osage County Linn, Missouri



Dear Sir:

We have received your request for an opinion of this Department, which request is as follows:

"At a recent Election in this County of Osage, a large reorganization, school district set up, was adopted by the voters thereof, embracing 13 common School districts and designated by the County Board as "R--1" and in which there is now a six director board, required to levy at least \$1.00 on the \$100.00 valuation. These 13 common School districts, taken in, by their proper officers, had by May 15th, submitted their respective levies, for use of the County Clerk, in extending the taxes on the books, to be turned over to the collector, for the fall collections of County Revenues.

"Soon, and within a few days, the new large reorganized district, will elect its six member board of directors and be in working order.

"Now, since the County Clerk is making up his books for the collector, does he follow the rates of levy, by these 13 common School districts, now on file, or has the New Board of the reorganized and enlarged district, the power, at this late day, to change those rates of levy in obedience to the law, requiring them to levy at least \$1.00. None of the 13 common School districts, levied as high as \$1.00."

Reorganization of school districts was provided by Senate Bill No. 307 of the Sixty-fourth General Assembly, found in Laws of 1947, Volume II, page 370. That Act makes no provision concerning the tax rate within a district which is organized subsequent to May 15th, the date fixed by Section 10358, Mo. R.S.A., for the submission of estimates and rates of taxation for the ensuing year.

Section 11 of the School Reorganization Act provides as follows:

"The terms of office of all school directors and officers of the various school districts comprising the territory incorporated in such enlarged school districts shall cease upon the adoption of the plan of reorganization and the organization of the board of directors, and such officers shall deliver to the board of directors of the enlarged school district all property, records, books and papers belonging to such component districts. All funds in the hands of the county or township treasurer to the credit of the various districts composing such enlarged district shall be immediately transferred to the credit of the treasurer of such enlarged district. If any former six-director district shall be merged in any enlarged district as provided herein. the treasurer of such former six-director district shall immediately turn over to the treasurer of such enlarged district, all funds belonging to such former six-director district, and shall make settlement therefor as provided by Section 10480, Revised Statutes of Missouri, 1939: Provided, that the directors of such enlarged district shall faithfully perform all existing contracts and legal obligations of the component districts."

Under this provision, we are of the opinion that immediately upon organization of the board of directors of the reorganized district, the new board would immediately take over management of the affairs of the component districts and exercise all of the powers and duties formerly vested in the directors of such districts.

We are enclosing herewith an opinion of this Department dated September 7th, 1949, addressed to Honorable Robert G. Kirkland, Prosecuting Attorney of Clay County, on the question of the tax rate applicable upon annexation of school districts. In that opinion we pointed out that in the case of Lyons v. School Dist., 311 Mo. 349, 278 S.W. 74, the Supreme Court upheld the right of the

board of directors of a school district to withdraw an estimate previously filed and submit a new one on which a different rate of taxation may be levied.

We are of the opinion that the directors of the reorganized school district, as successors of the board of directors of the component districts, would have authority to withdraw the estimates filed by such district and submit a new estimate which may be the basis of a new levy at a rate not in excess of that which, under Section 11 of Article X of the Constitution of 1945, may be imposed without approval by the voters of the district.

It has been suggested that the formation of a reorganized district would automatically withdraw the estimates previously filed by the component districts. However, the Supreme Court has held in the case of State ex rel. v. Young, 327 Mo. 909, 38 S.W. (2d) 1021, referred to in the enclosed opinion, that the filing of an estimate is essential to the validity of any school tax levy. Should the formation of a newly reorganized district operate automatically to withdraw estimates previously filed, there might be insufficient time to permit the filing of new estimates, and, therefore, there would be no estimate on file on which to base the levy of a school tax for the particular year. We feel, therefore, that some affirmative action on the part of the directors of the reorganized district must be taken in order to withdraw the estimates previously filed.

As pointed out by the Supreme Court in the Lyons case, the new estimate must be submitted prior to the time that the old ones have been acted upon by the county clerk in extending the taxes on the books for the use of the collector.

CONCLUSION.

Therefore, we are of the opinion that upon the formation of a reorganized school district in accordance with Senate Bill No. 307 of the Sixty-fourth General Assembly, Laws of 1947, Volume II, page 370, the directors of such reorganized district may withdraw the estimates of the various districts making up such reorganized district and submit a new estimate on which the levy of a tax at the rate of One Dollar per hundred dollars may be based, provided that such action is taken before the estimates submitted by the various districts have been acted

upon by the county clerk in extending the taxes. If no action is taken to withdraw the estimates filed by the districts forming the reorganized district, the taxes should be extended according to the estimates filed on behalf of such districts.

Respectfully submitted,

APPROVED:

ROBERT R. WELBORN Assistant Attorney General

J. E. TAYLOR Attorney General

RRW/few

Enclosure

for the collection of delinquent personal taxes without additional compensation.

September 14, 1949

Honorable Elmer Peal Prosecuting Attorney Pemiscot County Caruthersville, Missouri



9/14/49

Dear Sir:

Reference is made to your request for an official opinion of this Department, reading as follows:

"Our County Collector has taken up with me the matter of filing suit to enforce collection of personal delinquent taxes. Section 11112 sets out the procedure, but says nothing about attorney's fees, and does not say that the Prosecuting Attorney is to file said suits for the Collector.

"I would greatly appreciate an opinion from your office in this matter, I am, "

Your inquiry resolves itself into two distinct questions:

- (1) Is the Prosecuting Attorney required to institute proceedings for the collection of delinquent personal taxes, and
- (2) If so, is such officer entitled to additional compensation for his duties so performed?

We shall discuss the questions in the order mentioned. This opinion will be limited to counties of the third class, of which Pemiscot County forms a part, in accordance with the classification act found Laws of Missouri, 1945, page 1801.

Section 11112, Mo. R.S.A., referred to in your letter of inquiry reads in part as follows:

"Tangible personal property taxes assessed on and after January 1, 1946 and all personal

taxes delinquent at that date, shall constitute a debt, as of the date on which such taxes were levied for which a personal judgment may be recovered against the party assessed with such taxes before any court of this State having jurisdiction. actions commenced under this law shall be prosecuted in the name of the State of Missouri, at the relation and to the use of the collector and against the person or persons named in the tax bill, and in one petition and in one count thereof may be included the said taxes for all such years as may be delinquent and unpaid, and said taxes shall be set forth in a tax bill or bills of said personal back taxes duly authenticated by the certificate of the collector and filed with the petition; and said tax bill or tax bills so certified shall be prima facie evidence that the amount claimed in said suit is just and correct, and all notices and process in suits under this law shall be sued and served in the same manner as in civil actions, and the general laws of this state as to practice and proceedings and appeals and writs of error in civil cases shall apply, as far as applicable, to the above actions. Provided, however, that in no case shall the state, county, city or collector be liable for any costs nor shall any be taxed against them or any of them. * * *

This statute provides the method for the collection of delinquent taxes on tangible personal property and is the method used to enforce collection of such taxes for the benefit of the state, county, etc., for whose behalf such taxes have been levied. You will further note that under the first sentence of the statute such taxes constitute a "debt".

It is true that no specific reference is made in the statute to the duties of the Prosecuting Attorney with respect to the institution and prosecution of the suits provided for therein. However, your attention is directed to Section 12942, R. S. Missouri, 1939, relating to the general duties of Prosecuting Attorneys, which reads in part as follows:

"The prosecuting attorneys shall commence and prosecute all civil and criminal actions

in their respective counties in which the county or state may be concerned, defend all suits against the state or county, and prosecute forfeited recognizances and actions for the recovery of debts, fines, penalties and forfeitures accruing to the state or county; * * *

(Underscoring ours.)

It is apparent that this statute imposes the duty upon Prosecuting Attorneys to collect all "debts" due the county of which he is an officer. Viewing this provision with reference to the fact that Section 11112, Mo. R.S.A., establishes delinquent tangible personal property taxes as a "debt" of the taxpayer, it necessarily follows that the duty of instituting and prosecuting suits for the collection of such delinquent taxes is imposed upon the Prosecuting Attorney.

It is also true that no specific provision is incorporated in the statute authorizing the payment of any fee or compensation to the Prosecuting Attorney for performing such duties. However, in the case of Williams v. Chariton County, 85 Mo. 645, the rule was declared by the Supreme Court of Missouri to be as follows:

"Under the authority of the case of Shed v. Ry. Co., 67 Mo. 687, no fees are allowed an officer except where expressly given and allowed by law.

Following this early case, there have been numerous others decided by the Supreme Court, holding in substance that an officer who claims compensation for the performance of an official act must point to a statute specifically authorizing the payment to him of such compensation. This rule was again declared in Nodaway County v. Kidder, 129 S.W. (2d) 857, wherein the Supreme Court said:

"The general rule is that the rendition of services by a public officer is deemed to be gratuitous, unless a compensation therefor is provided by statute. If the statute provides compensation in a particular mode or manner, then the officer is confined to that manner and is entitled to no other or further compensation or to any different mode of securing same. Such statutes, too must be strictly construed as against the officer. State ex rel. Evans

v. Gordon, 245 Mo. 12, 28, 149 S.W. 638; King v. Riverland Levee Dist., 218 Mo. App. 490, 493, 279 S.W. 195, 196; State ex rel. Wedeking v. McGracken, 60 Mo. App. 650, 656.

"It is well established that a public officer claiming compensation for official duties performed must point out the statute authorizing such payment. State ex rel. Buder v. Hackmann, 305 Mo. 342, 265 S.W. 532, 534; State ex rel. Linn County v. Adams, 172 Mo. 1, 7, 72 S.W. 655; Williams v. Chariton County, 85 Mo. 645."

With this rule in mind and giving due regard to the provisions of Sections 12939.1, Mo. R.S.A., providing for the compensation of Prosecuting Attorneys in counties of the third class, we reach the conclusion that no additional compensation may be allowed a Prosecuting Attorney for his duties in connection with the institution and prosecution of suits for the recovery of delinquent taxes on bangible personal property.

CONCLUSION.

In the premises we are of the opinion that Prosecuting Attorneys in counties of the third class are required to institute and prosecute suits for the recovery of delinquent taxes on tangible personal property as provided in Section 11112, Mo. R.S.A.

We are further of the opinion that such officers are not entitled to additional compensation for the discharge of their official duties performed in connection with such suits.

Respectfully submitted,

APPROVED:

WILL F. BERRY, JR. Assistant Attorney General

J. E. TAYLOR Attorney General

WFB/few

COUNTY TREASURERS:

County and township treasurers nave no authority to hold or disburse funds of school districts enlarged or reorganized under the provisions of Section 1, Laws of Mo. 1947, Vol. II, page 371.

September 21, 1949

9/28/49

Hon. John P. Peters Prosecuting Attorney Osage County Linn, Missouri



Dear Mr. Peters:

Your letter of September 14, requesting an opinion, is as follows:

"Under the new School law, and particularly Section 11, on page 376, Vol. II, Laws of Missouri, 1947, should these new enlarged or reorganized districts choose a treasurer, under bond, as required of 'City, Town and Consolidated districts' or should their funds be in custody of the County Treasurer and disbursed by the county treasurer?

"Even if said Section 11, by fair implication, contemplates that such new districts should have their own treasurer, yet would it be lawful, notwithstanding that fact, for the County Treasurer to handle and disburse the funds of such districts, the same as for common school districts?"

The statutes governing the problems you raise are as follows:

Section 10, Laws of Missouri, 1947, page 375, states the new laws governing the election of directors in the enlarged and reorganized school districts, and provides that they (the directors) shall be governed "by the laws applicable to six-director school districts."

Laws of 1931, Section 21, page 334, entitled "An Act to Provide for the Establishment of Enlarged School Districts," is set out in R. S. Mo. 1939, Section 10466, in part, as follows: " * * * The ballot shall contain a statement of the proposition and space for
voting thereon, reading 'For Organization
of New School District' and 'Against
Organization of New School District',
also said ballot shall contain the names
of candidates for membership on the new
Board of Education. * * * The two candidates for the Board of Education receiving the highest number of votes shall be
elected for three years, the next two for
two years, and the next two for one year.
* * * " (Underscoring ours.)

R. S. Mo. 1939, Section 10470, relating to organization of board and duties of officers of the consolidated six-director school districts, provides, in part, as follows:

" * * * and the board shall, on or before the fifteenth day of July of each year, elect a secretary and a treasurer, * * *"

R. S. Mo. 1939, Section 10477, provides for the bonding of the treasurers of the six-director school districts as follows:

"The treasurer, before entering upon the discharge of his duties as such, shall enter into a bond to the state of Missouri, with two or more sureties, to be approved by the board, conditioned that he will render a faithful and just account of all money that may come into his hands as such treasurer, and otherwise perform the duties of his office according to law - said bond to be filed with the secretary of the board; and thereafter said treasurer shall be the custodian of all school moneys derived from taxation for school purposes in said district * * * *

In State ex rel. Cravens v. Thompson, 22 S.W. (2d) 196, the duties and bonding of the six-director school district treasurer are set out in full and substantially encompass the statutes set out above.

R. S. Mo. 1939, Section 10479, provides, in part, as follows:

"Whenever any state or county school money apportioned to any town, city or consolidated school district shall have been paid to any county or township treasurer, as now provided by law, the same shall, on the application of the treasurer of said town,

city or consolidated school district, be paid over to him by said county or town-ship treasurer, * * *"

R. S. Mo. 1939, Section 10482, provides, in part, as follows:

"The county or township collector shall pay over to the treasurer of said board of education all moneys received and collected by him to which said board is entitled at least once in every month; * * *

As stated at the beginning, the school law of 1947, Section 10, provides that the directors of the new enlarged school districts shall be governed by the laws applicable to six-director school districts. The act creating the six-director school districts has been set out in part (Section 10466, R. S. Mo. 1939), as well as the certain of the laws governing such districts, including the appointment of a treasurer, provision for bond, and the section directing that school funds held by county or township treasurers shall be paid over to the treasurer of the consolidated school district, and that the county or township collectors shall pay over directly to the treasurer of the board of education all school moneys collected by him.

Laws of 1947, Volume II, Section 1, page 371, provides, in part:

"There is hereby created in each county of Missouri a county board of education.

Section 6, id., provides, in part:

"The county board of education * * * shall

"(1) Within six months after its organization, make or cause to be made and completed a comprehensive study of each school district of the county and prepare a plan of reorganization. * * *"

Section 10, id., provides, in part:

"If the proposal to form such enlarged district has received a majority of the votes cast on such proposition the county

board of education shall order an election in such enlarged district, * * * for the purposes of electing six directors in such enlarged district. * * * The directors above provided shall be governed by the laws applicable to six-director school districts."

Section 11, id., provides:

"The terms of office of all school directors and officers of the various school districts comprising the territory incorporated in such enlarged school districts shall cease upon the adoption of the plan of reorganization and the organization of the board of directors, and such officers shall deliver to the board of directors of the enlarged school district all property, records, books and papers belonging to such component districts. All funds in the hands of the county or township treasurer to the credit of the various districts composing such enlarged district, shall be immediately transferred to the credit of the treasurer of such enlarged district. If any former sixdirector district shall be merged in any enlarged district, as provided herein, the treasurer of such former six-director district shall immediately turn over to the treasurer of such enlarged district, all funds belonging to such former six-director district, and shall make settlement therefor as provided by Section 10480, Revised Statutes of Missouri, 1939: Provided, that the directors of such enlarged district shall faithfully perform all existing contracts and legal obligations of the component districts.

Since the new enlarged or reorganized districts are to be "governed by the laws applicable to six-director school districts," and inasmuch as the laws applicable to such six-director districts provide for the choosing of a treasurer under bond, and further provide that the county or township collectors are to turn school funds directly over to the school district treasurer and that the county treasurer shall turn over funds to the district treasurer, it is clear that the new enlarged

districts should choose a treasurer under bond who should take custody of and disburse all school funds belonging to his district. This position is further supported by Section 11, Laws of 1947, supra, particularly that section stating "all funds in the hands of the county or township treasurer to the credit of the various districts composing such enlarged district, shall be immediately transferred to the credit of the treasurer of such enlarged district."

It is plain to us that this section contemplates that the treasurer of the reorganized district is to be the sole, lawful custodian of the school funds of his district, and in him alone is vested the power to disburse such funds.

Conclusion.

It is therefore the conclusion of this office that:

- 1. The new enlarged or reorganized school districts regulated by the provisions of Section 11, Volume II, Laws of Missouri, 1947, should choose a treasurer under bond;
- 2. The funds of said school district should be in the custody of and subject to disbursement by the school district treasurer:
- 3. The county and township treasurers have no authority to hold or disburse funds of the reorganized school districts;
- 4. Any such funds now in the hands of county or township treasurers should be immediately placed under the exclusive control of the treasurer of the reorganized or enlarged school district.

Respectfully submitted,

APPROVED:

H. JACKSON DANIEL Assistant Attorney General

J. E. TAYLOR Attorney General

HJD:ml

Production of receipt of taxpayer for letter notifying him of suit essential for personal judgment for personal property taxes.

November 14, 1949

11/22/49

Honorable Elmer Peal Prosecuting Attorney Pemiscot County Caruthersville, Missouri



Dear Sir:

We have received your request for an opinion of this Department, which request is as follows:

"Our County Collector mailed out notice to a delinquent personal Tax payer as is required by section 11113, to wit, a registered letter with a return receipt requested. The letter or notice with the return receipt attached were returned unclaimed.

"Now said section states that it is necessary to produce the receipt of the defendant for said notice. We have no receipt but can get service and in such a case what do you advise."

Section 11112, R. S. Missouri, 1939, as amended Laws of Missouri, 1945, page 1847, provides:

"Tangible personal property taxes assessed on and after January 1, 1946, and all personal taxes delinquent at that date, shall constitute a debt, as of the date on which such taxes were levied for which a personal judgment may be recovered against the party assessed with such taxes before any court of this State having jurisdiction. All actions commenced under this law shall be prosecuted in the name of the State of Missouri, at the relation and to the use of the collector and against the person or persons named in the tax bill, and in

one petition and in one count thereof may be included the said taxes for all such years as may be delinquent and unpaid, and said taxes shall be set forth in a tax bill or bills of said personal back taxes duly authenticated by the certificate of the collector and filed with the petition; and said tax bill or tax bills so certified shall be prima facie evidence that the amount claimed in said suit is just and correct, and all notices and process in suits under this law shall be sued and served in the same manner as in civil actions, and the general laws of this state as to practice and proceedings and appeals and writs of error in civil cases shall apply, as far as applicable, to the above actions. Provided, however, that in no case shall the state, county, city or collector be liable for any costs nor shall any be taxed against them or any of them. For the purpose of this chapter, personal tax bills shall become delinquent on the first day of January following the day when said bills are placed in the hands of the collector, and suits thereon may be instituted on and after the first day of February following, and within five years from said day. Said personal tax shall be presented and allowed against the estates of deceased, or insolvent debtors, in the same manner and with like effect, as other indebtedness of said debtors. The remedy hereby provided for the collection of personal tax bills is cumulative, and shall not in any manner impair other methods existing or hereafter provided for the collection of the same."

Section 11113, R. S. Missouri, 1939, as amended Laws of Missouri, 1945, page 1847, provides:

"Before any suit shall be brought to recover delinquent personal taxes the tax collector shall notify the delinquent taxpayer by registered letter that there are taxes assessed against him, stating the amount of taxes due and the year for which they are due, that if the same are not paid within thirty days suit will be brought to recover said taxes, for which notice a fee of twenty-five cents may be charged and collected by the collector. And in any suit to recover personal delinquent taxes, it shall be necessary to produce the receipt of the defendant of letter containing notice herein required."

" * * The levying of taxes is a matter solely of statutory creation, and no means can be resorted to, to coerce their payment, other than those pointed out in the statute. * * * " City of Caron-delet v. Picot, 38 Mo. 125, 1.c. 130.

"Where the statute authorizes suit only under certain circumstances, such circumstances must exist in order that the suit may be maintained. All conditions precedent imposed by the statute must, of course, be observed or the suit will fail." 61 C. J., Taxation, Section 1385, page 1055.

"If the statute requires a demand upon the taxpayer and his refusal to pay to precede the institution of an action against him, it is mandatory; * * *. * * Where the statute requires written notice of delinquency, it must be given or the action cannot be maintained." Ibid, Section 1386, page 1056.

The statute here in question authorizes suit for personal judgment for delinquent personal property taxes only after thirty day notice to the taxpayer by registered letter. Production of the receipt is essential to obtain judgment. If the receipt cannot be produced, under the rules above referred to, judgment cannot be obtained, and the fact that personal services might be had does not obviate the necessity of compliance with the statutory requirement.

If personal service may be had, the obtaining of a receipt for the letter notifying the taxpayer of the intended suit would not appear to be impossible. If, however, no receipt can be obtained, the only other procedure would be by distraint under Section 11086, R. S. Missouri, 1939. " * * * As far as we are advised, distraint and sale, personal judgment, and allowance against the estate of deceased or insolvent debtors are the only methods provided by statute to enforce collection of personal taxes. * * *" State ex rel. Hibbs v. McGee, 329 Mo. 1176, 44 S.W. (2d) 36, 1. c. 38.

CONCLUSION

Therefore, it is the opinion of this Department that under Section 11113, R. S. Missouri, 1939, as amended, Laws of 1945, page 1847, the production of the receipt of the taxpayer for the letter notifying him of the proposed suit is a condition precedent to the obtaining of a personal judgment for delinquent personal property taxes, and that, if such receipt cannot be obtained, the only other procedure, other than against the estate of a decedent or insolvent, is by distraint under Section 11086, R. S. Missouri, 1939.

Respectfully submitted,

APPROVED:

ROBERT R. WELBORN Assistant Attorney General

J. E. TAYLOR

Attorney General

RRW/feh

MAGISTRATES: Maximum amount payable by state for clerk hire in St. Louis.

FILED 7/

May 13, 1949

5-13

Comptroller
Department of Revenue
Jefferson City, Missouri

Dear Sir:

We have received your request for an opinion of this department, which request is as follows:

"Under Laws 1945, Sec. 22; page 776, and Laws 1947, Vol. 1, Sec. 5, page 259, nine clerks of the nine magistrate courts in the City of St. Louis are each paid a salary at rate of \$3,000.00 per annum.

"Sec. 3, Laws 1945, page 808, provides for a Chief Clerk and two deputies. No compensation is fixed.

"The chief magistrate of the magistrate courts in the City of St. Louis makes requisition for salaries for the chief clerk and the two deputies at the rate of \$5,000.00 per annum for the chief clerk and \$2,400.00 each for the two deputy clerks. A letter from George W. Johnson, Chief Magistrate in City of St. Louis dated March 9th, 1949, states that beginning April 1st salaries of the chief clerk will be increased to \$6,000.00 per year and the deputies to \$3,600.00 per year.

"May I have an opinion as to what salary, if any, the State is to pay to the chief clerk and the two deputies, provided for in Sec. 3, Laws 1945."

Hon. E. L. Pigg

The organization of the Magistrate Court of the City of St. Louis is provided by an act of the General Assembly, found in Laws of 1945, page 807, as amended by Laws of 1947, Volume I, page 258. Section 3 of the act provides, in part:

"Each such magistrate court in bane shall be composed of all the magistrates, and each division thereof shall be composed of at least one magistrate. The court may appoint from its number a chief magistrate, and may appoint and remove at its pleasure a chief clerk and not more than two deputy clerks, and a chief constable from among the constables. * * * *"

Section 5 (found in Laws of 1947, Vol. I, p. 258) provides, in part:

"The salaries of the magistrates and clerks of the court shall be fixed and paid as provided by general law for other magistrates and clerks in such counties, except that the annual salary of each magistrate shall be \$6,000.00. * * *"

The section then fixes the salary of the constable and his deputies, but contains no reference to the salaries of the clerks of the court.

Section 21 of the general Magistrate Court Law (Laws 1947, Vol. I, p. 240) provides, in part, as follows:

"In all counties each magistrate shall by an order duly made and entered of record appoint and fix the salary of a clerk of his court and may appoint such deputies and employees as may be necessary for the proper dispatch of the business of his court and fix their salaries at such sum as in his discretion may seem proper. * * *"

Section 22, Laws of 1945, page 765, provides, in part, as follows:

"Salaries of clerks, deputy clerks and employees provided for in the last preceding section shall be paid by the state within the limits herein provided upon requisition filed by the judge of the magistrate court; except that the salaries of clerks, deputy clerks and employees of additional magistrates whose offices are created by order of the circuit court as provided in Section 1 of this act shall be paid by the county as the salaries of such magistrates are required to be paid. The total amount that may be paid by the state in any one year for such clerks, deputy clerks and employees of the magistrate courts in the different counties shall not exceed the following sums:

" * * * and in all counties now or hereafter having a population in excess of 100,000 inhabitants, the sum of \$3000 for each magistrate in the county. * * *"

It will be noted that Section 22 of the general Magistrate Court Law, in prescribing the limitation upon the amount which the state shall pay for clerical hire in the various counties, refers to the "Salaries of clerks, deputy clerks and employees provided for in the last preceding section," which is Section 21.

The chief clerk of the Magistrate Court for the City of St. Louis and his two deputies are not appointed under Section 21. They are appointed pursuant to Section 3 of the law applicable to the City of St. Louis, supra.

Thus, there is no statutory limitation upon the amount which the State of Missouri shall pay for the salary of the chief clerk and his deputies. That the state is liable to pay such salaries was determined by the Supreme Court in the case of State ex rel. Hart, et al., v. City of St. Louis, 356 Mo. 820, 204 S.W. (2d) 234.

In view of the statute authorizing the magistrate court to fix the salaries of clerks and deputy clerks at such sum as in the discretion of the court may seem proper (Sec. 21, supra), the holding of the Supreme Court that the state is liable for such salaries, and the lack of any limitation upon the amount which the state shall pay on such salaries, we feel that the state is required to pay such salaries as may be fixed and determined by the magistrate court.

Conclusion.

Therefore, it is the opinion of this department that the state is liable for the pay of the chief clerk and two deputy clerks for the Magistrate Court of the City of St. Louis in such amounts as may be fixed by said court for the salaries of such chief clerk and two deputy clerks.

Respectfully submitted,

ROBERT R. WELBORN Assistant Attorney General

APPROVED:

J. E. TAYLOR Attorney General

RRW:ml

COUNTY LIBRARIES)

County Library Board may spend surplus funds for construction of building. May not obtain building under long-term lease with option to buy.

October 14, 1949

Mr. Paxton P. Price State Librarian Missouri State Library State Office Building Jefferson City, Missouri



Dear Sir:

We have received your request for an opinion of this department, which request reads as follows:

"We are writing you at this time for an opinion concerning the problem of purchasing sites and construction of library buildings without an increase in the present tax rate.

"Several counties have unexpected surpluses at the moment as a result of a favorable decision of the Supreme Court in a test case involving the imposition of the library tax upon distributable property of utilities. These surplus funds are in excess of immediate financial needs. This applies to several counties now maintaining tax-supported county libraries and we feel it is a matter which might well be considered by the Attorney General and be the subject of an opinion.

"As you undoubtedly know, the only reason the problem arises is because of the language to be found in Section 14773 of the Missouri Statutes, which section authorized the imposition of an additional tax not to exceed 1-1/2 mills for a period of five years for building purposes. Is this statute preclusive, or are we correct in assuming that it is simply a means whereby a county library can collect additional taxes to enable it to build?

"A related problem is whether there is any way by which a county library can obtain a building costing in excess of any present surplus funds which it may have, or which it can reasonably expect to have prior to the completion of the building. This is a somewhat more difficult problem. What we have in mind, of course, is private financing of the construction of the library, the taking of a lease of the premises with a right to purchase it at any time upon payment of a certain stipulated balance, receiving credit for sums previously paid as rental."

Section 11, Article X, Constitution of 1945, provides in part as follows:

" * * * and provided further, that any county or other political subdivision, when authorized by law and within the limits fixed by law, may levy a rate of taxation on all property subject to its taxing powers in excess of the rates herein limited, for <u>library</u>, hospital, public health, recreation grounds and museum purposes."

(Emphasis ours.)

Section 11047.1, Missouri R.S.A., Laws of 1945, page 1387, provides:

"Any county, or other political subdivision otherwise authorized by law to support and conduct a library may levy for library purposes in addition to the limits presscribed in Section 11, Article X of the Constitution a rate of taxation on all property subject to its taxing powers in an amount as now or hereafter prescribed by law: Provided, that political subdivisions now having or hereafter having a population of not less than 300,000 inhabitants according to the last Federal decennial census are authorized to levy for library purposes a rate which shall not exceed ten cents on the hundred dollars assessed

valuation, annually, on all taxable property in such subdivision."

Statutes dealing with the formation of county library districts and relevant to the question hereunder consideration are found in Article 6 of Chapter 110, R.S. Missouri, 1939. Section 14767 of that article provides in part as follows:

"* * *And if, from returns of such election, which shall be certified to the county court, the majority of all the votes cast on such propositions at such election shall be

"'for establishing ___ county library district,'

"and for the tax for a free county library, the county court shall enter of record a brief recital of such returns and that there has been established

11	1	county	library	district,
	AND RESIDENCE OF THE PERSON NAMED IN			

"and thereafter such

" county library district

"shall be considered and held to be established, shall be a body corporate, and known as such; and the tax specified in such notice shall, subject to provisions herein below of this section, be levied and collected, from year to year, in like manner with other taxes in the rural school districts of said county. The proceeds of such levy, together with all interest accruing on same, with library fines, collections, bequests and donations in money shall be deposited in the treasury of the county and be known as the 'county library fund, ' and be kept separate and apart from other moneys of such county, and disbursed by the county treasurer only upon the proper authenticated vouchers of the county library board hereinafter mentioned: Provided, that such taxes shall cease, in case the regular voters of

any such district shall so determine by a majority vote at any annual election held therein, after petition, order of court, and notice of such election and of the purpose thereof, first having been made, filed and given, as in the case of establishing such county library district."

Section 14768 provides that the county library board shall "in general carry out the spirit and intent of this article in establishing and maintaining such free county library and branches thereof."

Section 14769 provides:

"Said ' county library district as such body corporate, by and through said county library board, shall have power to sue and be sued, to complain and defend, and to make and use a common seal, to purchase or lease grounds, to lease, occupy or to erect an appropriate building or buildings for the use of said county library and branches thereof, and to sell and convey real estate and personal property for andon behalf of the county library and branches thereof, to receive gifts of real and personal property for the use and benefit of such county library and branch libraries thereof, the same when accepted to be held and controlled by such board, according to the terms of the deed, gift, devise or bequest of such property.

Section 14773 provides:

"Whenever, in any county library district, which has decided or shall hereafter decide to establish and maintain a free county library under the provisions of this article, the county library board shall by written resolution entered of record, deem it necessary that a free county library building should be erected in such county and one hundred (100) taxpaying citizens of any such county library district, shall in writing

petition the county court asking that an annual tax be levied at and as an increased rate of taxation for such library building and shall specify in their petition a rate of taxation not to exceed one and one-half mills on the dollar annually, and not to be levied for more than five years on all taxable property in such county library district; then the county court shall, if it finds said petition was signed by the requisite number of qualified petitioners, enter of record a brief recital of such petition, and of its finding aforesaid, and shall order that the proposition of such petition be submitted to the voters of such county library district at the next annual election to be held on the first Tuesday in April; and that the clerk of the county court shall cause to be published the proposition of such petition and said county clerk shall cause said proposition to be published in like manner, as near as may be, with the publication of 'the nominations to office,' as provided in section 11542, R.S. 1939. S order of court and such notice shall specify the rate of taxation mentioned in said petition; and the county clerk shall make and file in his office return of service of such notice; and every voter within such county library district may, in his proper district, as in section 14767 of this article provided, vote

"'for mills tax for erection of free county library building,'

or

"'against mills tax for erection of free county library building,'

and if the majority of the qualified voters of such county library district voting on said proposition at such election shall vote

"'for ___ mills tax for erection of free county library building'

the tax specified in such notice shall be levied and collected in like manner with other taxes of said county library district, and shall be known as the 'county library building fund,' and shall be subject to the exclusive control of said county library board and be drawn upon by the proper officers in such county upon the properly authenticated vouchers of said board, and be used for the erection of the library building. The fund hereby provided for the erection of a free county library building in such county shall be in addition to the tax levied for the establishment and maintenance of such county library."

Section 14767, which authorizes the imposition of library taxes, does not make any express provision regarding the expenditures of the funds obtained by the imposition of the library tax. Section 14769 provides that the county library board shall have power "to purchase or lease grounds, to lease, occupy or to erect an appropriate building" for use of the county library. Inasmuch as there is no express limitation on the use of the proceeds of the tax authorized by Section 14767, the board would have authority to use such funds in the performance of its duties and exercise of its powers. However, Section 14773 authorizes the imposition of a tax for the construction of a building and provides a fund "for erection of a free county library building * * * in addition to the tax levied for the establishment and maintenance of such county library." Is the method provided by Section 14773 the exclusive method of raising a fund for the construction of a library building?

Section 14773 was undoubtedly enacted by reason of the provisions of Section 12 of Article X, Constitution of 1875, which was in effect at the time of its enactment. See Section 26(a), (c), Article X, Constitution of 1945. That section provided in part, "No county, city, town, township, school district, or other political corporation or subdivision of the state shall be allowed to become indebted in any matter or for any purpose to an amount exceeding in any year the income and revenue provided for such year without the consent of two-thirds of the voters thereof voting on such proposition at an election held for that purpose; * * *."

In the case of School District No. 14, Stone County v. Middleton, et al., 24 S.W. (2d) 1053, the Springfield Court of Appeals considered the question on the right of a school board to spend current funds for the construction of foot bridges in view of the provisions of Section 11152, R. S. Missouri, 1919, (Section 10359, R. S. Missouri, 1939, now repealed Laws of 1945, page 1629), authorizing the levy of an additional tax for the building, repair and maintenance of foot bridges. In the course of its opinion, the court stated (24 S. W.

(2d) 1.c. 1054):

"Under the laws of this state as found under chapter 102, articles 2 and 3, of the Revised Statutes of Missouri, 1919, the school boards, and they alone, are intrusted with the duty of providing and maintaining school facilities, including sites, schoolhouses, footbridges, and furnishings. Under section 11152, R. S. 1919, it is made the duty of the board of directors to provide for the building, repairing, and maintaining footbridges over a running stream and to provide revenue for the purpose when deemed necessary. The contention of the plaintiff is that this expenditure should not have been made for the construction of footbridges until first submitted to a vote of the qualified voters of the district. We think the plaintiff is in error about this as we view the law as to the duties of the board of directors. We think the duty is incumbent upon the board to construct the necessary footbridges and to furnish supplies for the use of the children in the district, if funds are available, and it is not necessary to submit the question to a vote of the people unless it becomes necessary to increase the taxes for that purpose. We think we are sustained in this contention by the Supreme Court of this state in the case of Hart v. Board of Education, 299 Mo. 36, 252 S.W. 441, where the Supreme Court said:

"'Under the statutes of this state (sections 11127, 11134, and 11135, R. S. 1919), the school boards, and they alone, are intrusted with the duty of providing and maintaining facilities, including sites, schoolhouses, and furnishings. The methods and means to be employed in the discharge of these functions are committed wholly to their judgment and discretion. It is unnecessary therefore for them to submit to the electorate the question as to whether, under a given situation, they shall increase the housing facilities of the school district by erecting one new building, or more than one, or the question as

to where such building or buildings shall be located. The only thing that they are required to go to the taxpayer for is authority to borrow money (or to increase the tax rate.)"

(Emphasis ours.)

In the case of Decker v. Diemer, 229 Mo. 296, 129 S.W. 936, the Supreme Court considered the question of the power of the county court to construct a courthouse building from surplus funds rather than from the proceeds of bonds voted for the purpose. In the course of its opinion the court said (229 Mo., 1.c. 337):

"* * * Is not the building of a courthouse as legitimate as any other county purpose? Are bonds so desirable that the people of a Missouri county must bond themselves when bonds are not necessary, or go without a courthouse? Must they levy special taxes when they have the means in the treasury to avoid such special levy? Running like a thread through the statutes is the idea of as low a rate of taxation as is compatible with the welfare of the people, and the other idea that the county's business must be done for cash. All these ideas are conserved by the holding made."

In the present situation there is no question of the restriction of the activity of the county library board for the purpose of accumulating a fund for the construction of a building. The funds are now in the hands of the library boards by reason of the decision of the Supreme Court in the case of State ex rel. Benson v. Union Electric Company of Missouri, 220 S.W. (2d) 1. By reason of the decision of the court in that case, public utilities having property in various library districts have paid taxes assessed and payable for the years 1946, 1947 and 1948, and the surplus funds are available by reason of such payment. Inasmuch as the funds are now on hand, we see no reason for their not being used for any legitimate purpose within the authority of the county library board. As set out above, in Section 14769 the board is authorized to erect a building.

This does not appear to be a situation in which the holding of cases prohibiting the transfer of school district funds from one fund to another is applicable. See Russell v. Frank, 348 Mo. 533, 154 S.W. (2d) 63. Statutory provisions relative to school funds

provide expressly for their being held in specific funds and used for such purposes only. Section 10366, R. S. Missouri, 1939. Moreover, school taxes are voted according to such specific funds. Section 10347, R. S. Missouri, 1939.

As for your second question, the county library board may incur indebtedness only if authorized by statute. There is no authority given them to issue bonds or to incur an indebtedness in excess of one year's anticipated revenue, and, therefore, the board would have no authority to obtain funds for private financing for the construction of a building.

Insofar as the question of making a long-term lease with option to purchase is concerned, the Supreme Court considered such an arrangement in the case of Sager v. Stanberry, 336 Mo. 213, 78 S.W. (2d) 431, in the light of the constitutional provision above referred to prohibiting municipal corporations incurring an indebtedness in excess of its anticipated revenue for one year. In the course of its opinion the court stated (78 S.W. (2d), 1.c. 437):

"The evidence clearly shows that the city asked for and received bids for the purchase of the machinery included in the Fulton Company contract; that the city proposed to buy this machinery on the installment plan; that the Fulton Company's bid was accepted, and it was agreed, and so understood by the city officials and the representatives of that company, that the purchase price of the machinery with interest be paid in monthly installments over a period of 52 months with title reserved in the vendor until the machinery was paid for. The so-called lease designating the monthly installments as rentals is a patent attempt to disguise the true character of the transaction. The facts and events which we have heretofore stated suffice to demonstrate that it was not a bona fide lease, but in legal effect a purchase and sale of the machinery on the installment plan creating a present indebtedness for the full amount payable in deferred monthly installments. It is said in 19 R. C. L. at page 984: 'The purchase of a single public improvement by installments which in the aggregate exceed the debt limit cannot be accomplished by calling the installments rent, if there is a binding obligation to pay them for a definite period and

upon the payment of the last installment title to the property passes to the municipality, or by pledging the municipality's good faith for the payment of the installments when it is recognized that there can be no legal liability, if it is provided that if any installment is unpaid title to the entire property shall revert to the contracting party.' This device of clothing a sale and purchase, whereby the purchase price is to be paid in installments, in the guise of a lease and denominating the installments as rentals with a view to thereby circumventing constitutional and statutory debt limitations, has been frequently attempted. * * *"

In view of the holding of the Supreme Court in this case, we cannot sanction any such plan as this.

CONCLUSION.

Therefore it is the opinion of this Department that county library boards may use the surplus funds now in their hands by reason of the decision of the Supreme Court in the case of State ex rel. Benson v. Union Electric Company of Missouri, 220 S.W. (2d) 1, for the construction of library buildings.

We are further of the opinion that county library boards may not obtain buildings by the device of entering into a lease with an option to purchase upon payment of a specified purchase price with provision for application of rental paid in accordance with the lease upon the purchase price.

Respectfully submitted,

ROBERT R. WELBORN Assistant Attorney General

APPROVED:

J. E. TAYLOR Attorney General

RRW/feh

ELECTIONS: Conviction upon plea of nolo contendere of Federal income tax evasion disqualifies voter.

February 8, 1949

Honorable Frank L. Ramacciotti Chairman, Board of Election Commissioners 208 South Twelfth Boulevard St. Louis 2, Missouri FILED 73

Dear Sir:

We have received your request for an opinion of this department concerning the right of a person to be a registered voter in Missouri under the following circumstances:

In June, 1948, he entered a plea of nolo contendere in the United States District Court in St. Louis to a charge against him of evasion of the Income Tax Law, was sentenced to a year in jail and fined one thousand dollars, and immediately placed on probation for one year. The probation was terminated by order of the judge of the District Court within thirty days after the plea was entered.

In the case of State ex rel. Barrett v. Sartorious, 351 Mo. 1237, 175 S.W. (2d) 787, the Missouri Supreme Court held that under the provisions of Section 2 of Article VIII of the Constitution of 1875, and Section 11469, R. S. Mo. 1939, which provide for disfranchisement upon conviction of a felony, a person who had entered a plea of guilty in the United States District Court to an indictment charging him with attempting to evade payment of income taxes to the United States (26 U.S.C.A., Section 145(b) was not entitled to be registered as a qualified voter. The decision in that case, we feel, answers your question (Section 2, Article VIII of the Constitution of 1945 did not change in any material manner the same provision of the Constitution of 1875, and the amendment of Section 11496, R. S. Mo. 1939, by Laws of 1943, page 555, made no change in that section insofar as the present question

is concerned), unless the fact that, in the situation which you have presented, the conviction was entered upon a plea of nolo contendere rather than a plea of guilty would lead to a different result.

In the case of Wilson v. Burke, 356 Mo. 613, 202 S.W. (2d) 876, the Supreme Court considered the question of whether or not conviction by United States District Court upon a plea of nolo contendere to an indictment charging violation of the United States Liquor Laws was a conviction within Section 4906, R.S.Mo. 1939, which provides, in part:

" * * * no person shall be granted a license or permit * * * who has been convicted, since the ratification of the twenty-first amendment to the Constitution of the United States, of a violation of the provisions of any law applicable to the * * * sale of intoxicating liquor, * * *"

In that case the court held that the fact the judgment of conviction had been entered upon a plea of nolo contendere made no difference inasmuch as the statute contained no provision that a judgment of conviction based upon such plea should be an exception which would permit the Superintendent of the Department of Liquor Control to grant a license. "The legislature has the right to ignore the manner in which the conviction was reached, whether upon trial, upon plea of guilty or plea of nolo contendere." (202 S.W. (2d) 1.c. 878)

In the case of Neibling v. Terry, 352 Mo. 396, 177 S.W. (2d) 502, the Supreme Court upheld a judgment of disbarment under a statute (Section 13333, R. S. Mo. 1939) which authorized such action upon a "conviction for any criminal offense involving moral turpitude." The respondent in that case contended that because he had pleaded nolo contendere to a charge of using the mails to defraud, the judgment of conviction based upon such plea could not be used with the basis of disbarment action. The court held that inasmuch as the statute made no distinction or exception in a judgment of conviction, according to the nature of the plea resulting in such conviction, the court lacked authority to write any exception into the statute.

In the case which is the subject of your inquiry, a judgment of conviction was actually entered by the court on the plea of nolo contendere, and therefore the case of Meyer v. Missouri Real Estate Commission, 238 Mo.App. 476, 183 S.W. (2d) 342, in which no actual conviction on the plea of nolo contendere had been entered, is not in point here.

In view of the foregoing authorities, we think that the court of this state would not make any distinction because of the fact that the conviction was had upon the plea of nolo contendere.

CONCLUSION

Therefore, it is the opinion of this department that a person who has been convicted on a plea of nolo contendere in a Federal court on a charge of evasion of United States income tax is disqualified from voting in this state.

Respectfully submitted,

ROBERT R. WELBORN Assistant Attorney General

APPROVED:

J. E. TAYLOR Attorney General COURT-MARTIAL:

Conviction by court-martial does not affect civil rights, except in case of desertion.

January 25, 1949

Mr. George M. Reed State Service Officer State Office Building Jefferson City, Missouri

Dear Sir:

We have received your request for an opinion of this department, which request is as follows:

"Is a veteran who was convicted by a general court martial while in service, sentenced to and served time in disciplinary barracks, and dishonorably discharged entitled to citizenship status and legal rights, and allowed to vote, in the State of Missouri!"

"By the ancient common law, when sentence was pronounced for treason or other felony the offender was, by operation of law, placed in a state attainder. The principal incidents consequent on such attainder were forfeiture of estate, corruption of blood, and an extinction of civil rights, more or less complete, which was denominated civil death. * * *

"The incident of civil death attended every attainder of treason or other felony, disqualifying the attainted person from being a witness, bringing any action, or performing any legal function, and, in short, causing him to be regarded as dead in law. * * *

"In accordance with the modern policy of a more humane administration of the criminal law, the early doctrines of the common law in regard to attainder, forfeiture, and corruption of blood with respect to convicts have, under statutory or constitutional provisions, been either entirely swept away or greatly modified." 18 C.J.S., "Convicts," Section 2 and 3, pages 101, 102.

The statutes of Missouri contain numerous provisions relating to the effect of conviction for a crime upon various rights of the person convicted. Several such provisions are found in Chapter 31 of R. S. Mo. 1939, relating to crimes and punishments. These provisions are (R. S. Mo. 1939):

Section 4427, dealing with offenses affecting lives and persons;

Section 4561, dealing with offenses against property;

Section 4601, dealing with offenses against records, currency, etc.;

Section 4322, dealing with offenses against the administration of justice;

Section 4357, dealing with offenses by persons in office, and

Section 4796, dealing with other offenses.

These sections provide disqualification from voting, from holding office and from being a juror upon conviction of all felonies described in the particular article in which the section is found, as well as certain misdemeanors. Practically every felony described in the Criminal Code is, by these provisions, made a ground for disqualification from voting, holding office and being a juror. However, these provisions deal only with offenses for which conviction has been had under the particular article specified in the Missouri Criminal Code and would, therefore, be inapplicable to convictions by courts-martial, although the offense for which conviction by a court-martial had been obtained might be one punishable as a felony under the Missouri Criminal Code. State ex rel. Barrett v. Sartorious, 351 Mo. 1237, 175 S. W. (2d) 787, 149 A. L. R. 1067.

There are also several general statutes relating to the effect of conviction for a crime, none of which, however, by their terms expressly include conviction by a court-martial. For example, Section 9225, R. S. Mo. 1939, provides:

"A sentence of imprisonment in the penitentiary for a term less than life suspends all civil rights of the persons so sentenced during the term thereof, and forfeits all public offices and

trust, authority and power; and the person sentenced to such imprisonment for life shall thereafter be deemed civilly dead."

This section has been held not to apply to persons imprisoned under sentence of Federal court (Presbury v. Hull, 34 Mo. 29; Fidelity & Deposit Co. of Maryland v. Boundy, 236 Mo. App. 656, 158 S. W. (2d) 243), and such holdings would probably be sufficient authority for refusing to apply the section to persons convicted by courts-martial.

Section 813.10, Mo. R. S. A., Laws 1945, page 815, Section 11, provides that no one who has been convicted of a felony shall be permitted to serve as a juror.

Section 2 of Article VIII of the Constitution, 1945, provides that persons convicted of felony, or crime connected with the exercise of the right of suffrage, may be excluded by law from voting.

The Legislature has provided (Section 11469, R. S. Mo. 1939, amended Laws of 1943, page 555) that no person "convicted of a felony or other infamous crime, or of a misdemeanor connected with the exercise of the right of suffrage, (shall) be permitted to vote at any election unless he shall have been granted a full pardon; and after a second conviction of felony or other infamous crime, or of a misdemeanor connected with the exercise of the right of suffrage, he shall be forever excluded from voting." No limitation is contained in these provisions restricting convictions which will result in the disqualifications prescribed to convictions obtained in the courts of this state.

In the case of State ex rel. Barrett v. Sartorious, supra, the Supreme Court held that the provision relating to disfranchisement (Section 11469, R. S. Mo. 1939) included convictions in the Federal courts. The court further held that the constitutional provision (Section 2, Article VIII, Constitution of 1875, which is practically identical with Section 2, Article VIII, Constitution of 1945) referred to any felony under the laws of another jurisdiction, regardless of whether or not the same act would be a felony or any crime at all if committed in Missouri. Three judges disagreed with the holding of the court in the latter regard. Thus, the question of whether or not a conviction by court-martial, followed by a sentence to confinement in disciplinary barracks and dishonorable discharge, would result in disqualification from serving as a juror and from voting depends upon whether

or not such conviction by court-martial may be regarded as conviction of felony within the meaning of these sections.

"The law governing courts-martial is found in the statutory enactments of Congress, particularly the Articles of War in the Army Regulations and in the Customary Military Law." Carter v. McClaughry, 183 U. S. 365, 386, 46 L. Ed. 236, 22 Sup. Ct. 181. The Articles of War (Title 10, U. S. C. A., Sections 1471-1593) provide the composition, appointment, jurisdiction and procedure of courts-martial. They also prescribe the offenses for which punishment may be had by courts-martial and either prescribe the maximum punishment or authorize the President to fix such punishment. Many of the offenses are peculiar to military service and are not regarded as offenses in civil law. For example, the 54th Article of War relates to the offenses of fraudulent enlistments; the 56th to making a false muster; the 58th to desertion; the 63rd to disrespect towards a superior officer.

However, courts-martial are also given jurisdiction of offenses cognizable at civil law. The 92nd Article of War provides:

"Any person subject to military law who commits murder or rape shall suffer death or imprisonment for life, as a court-martial may direct; but no person shall be tried by court-martial for murder or rape committed within the geographical limits of the States of the Union and the District of Columbia in time of peace."

The 93rd Article of War provides:

"Any person subject to military law who commits manslaughter, mayhem, arson, burglary, housebreaking, robbery, larceny, embezzlement, perjury, forgery, sodomy, assault with intent to commit any felony, assault with intent to do bodily harm with a dangerous weapon, instrument, or other thing, or assault with intent to do bodily harm, shall be punished as a court-martial may direct."

These offenses are generally felonies under the law of the State of Missouri.

The 96th Article of War, which is a general cover-all section, provides:

"Though not mentioned in these articles, all disorders and neglects to the prejudice of good order and military discipline, all conduct of a nature to bring discredit upon the military service, and all crimes or offenses not capital, of which persons subject to military law may be guilty, shall be taken cognizance of by a general or special or summary courtmartial, according to the nature and degree of the offense, and punished at the discretion of such court."

Some Articles of War, such as the 92nd, prescribe the punishment to be fixed upon conviction. Most of the Articles of War, however, provide that the punishment shall be such as the court-martial may direct. The punishment in such cases is limited by the Table of Maximum Punishments (Manual for Courts-martial, U. S. Army, 1928, pages 97 to 101). Punishment may include dishonorable discharge, confinement at hard labor not to exceed a specified time, and forfeiture of pay. Under the 42nd Article of War punishment may be by confinement in the penitentiary where the period of confinement exceeds more than one year, provided that the sentence was imposed by way of commutation of a death sentence or which is wholly or partly based on one of the following offenses: Desertion in time of war, repeated desertions in time of peace, mutiny, or an offense involving an act recognized as an offense of a civil nature and made punishable by penitentiary confinement of more than one year by some statute of the United States of general application within the continental United States, excepting Section 289, Penal Code of the United States, 1910, or by the statutory or common law of the District of Columbia.

The 42nd Article of War further provides "that persons sentenced to dishonorable discharge and to confinement in the penitentiary shall be confined in the United States Disciplinary Barracks, or elsewhere, as the Secretary of the War or the reviewing authority may direct, but not in the penitentiary."

Many of the offenses for which dishonorable discharge and confinement are authorized by the Table of Maximum Punishments are, of course, strictly of a military character and are not cognizable at civil law. Fraudulent enlistment (A. W. 54),

disobedience of lawful order of commanding officer (A. W. 64), suffering through neglect, military property of value of more than \$50.00 to be damaged or lost (A. W. 83), are examples of such offenses.

The Table of Maximum Punishments fixes the maximum punishments for the offenses described in Article of War 93 at dishonorable discharge and confinement at hard labor ranging from six months to twenty years for the various offenses.

We find no cases in this state dealing with the question of whether or not a conviction by court-martial is regarded as a conviction of a felony within the meaning of the statutory provisions under discussion.

In the case of Getz v. Getz, 75 N. E. (2d) 530, the appellate court of Illinois considered the question of whether a wife whose husband had been convicted of desertion from the United States Army and sentenced to twenty-five years at hard labor in a United States Disciplinary Barracks was entitled to a divorce under a statute which provided for the granting of a divorce where "either party has been convicted of a felony or other infamous crime." (Illinois R. S. 1945, Chapter 40, paragraph 1.) The court held that the conviction by court-martial was not a conviction of a felony or other infamous crime within the meaning of the statute involved. In the course of the opinion the court said (75 N. E. (2d) 1.c. 532):

"It should also be noted that 'Courtsmartial, while resembling the civil
courts in some respects, are yet entirely distinct in their nature from
the civil tribunals; the power vested
in the military courts is not a part
of the judicial power of the United
States within the meaning of the constitution, and such courts are not included
in the judicial department of the government.' 6 C.J.S., Army and Navy, Sec. 51.
See also 36 Am. Jur. 244.

"A court-martial differs from a civil court in that pleading before a court-martial depends upon military usage (6 C.J.S., Army and Navy, Sec. 56); that the verdict of a court-martial is handed down by secret vote of the members of

the court itself (6 C.J.S., Army and Navy, Sec. 57); that except for conviction and sentence of death the vote need not be unanimous (ibid); that a courtmartial may be composed of commissioned officers only (6 C.J.S., Army and Navy, Sec. 52); and that the accused should not be tried by a court-martial composed of officers of rank inferior to that of the accused (6 C.J.S., Army and Navy, Sec. 54).

"In view of these facts, we are of the opinion that the Legislature, in enacting that conviction of a felony or other infamous crime constitutes ground for divorce, contemplated that such conviction be the result of a criminal prosecution wherein the accused, as 'in all criminal prosecutions,' might perfect his right, guaranteed by Article II, Section 9, of the Illinois Constitution. Smith-Hurd Stats. to 'public trial by an impartial jury of the county or district in which the offense is alleged to have been committed.' Such right of the accused to jury trial in all criminal cases, clearly including prosecution for felony, or other infamous crime, is absolute. * * *

In the case of Clark v. Clark, 94 N. H. 398, 54 Atl. (2d) 156, a different result was reached under a slightly different statute. In that case the husband had been convicted by general court-martial of the Navy for being absent without leave and sentenced to imprisonment for three and three-fourths years. The wife was held entitled to divorce under a statute providing that a divorce could be decreed upon "conviction of either party in any State or Federal district of a crime punishable with imprisonment for more than one year and actual imprisonment under such conviction." R. L. c. 339, 6, IV. It will be noted that the statute in that case referred to "conviction of * * * a crime punishable with imprisonment" rather than a "conviction of a felony." The court considered the military offense of AWOL a crime, but based its opinion more on the fact that the person convicted was actually in confinement.

In the Illinois case the court pointed out that it is not the policy of the law to favor divorce and, therefore, the

divorce statutes are given a strict rather than a liberal construction. By the same token, limitations upon the right of suffrage are strictly construed in order to effectuate the policy of the law in avoiding disfranchisement. Application of Lawrence, 353 Mo. 1028, 185 S. W. (2d) 818. In view of the nature of courts-martial, their method of procedure and the type of the offenses punishable by them, we feel that the Legislature did not intend to include convictions by courts-martial as convictions for felony within Sections 11469, R. S. Mo. 1939, and 813.10, Mo. R. S. A.

However, there is one offense for which conviction by court-martial will result in depriving the person convicted of such rights as are dependent upon citizenship in the United States. Title 8, U. S. C. A., Section 801, provides:

"A person who is a national of the United States, whether by birth or naturalization, shall lose his nationality by:

* * * * * * * * *

"(g) Deserting the military or naval forces of the United States in time of war, provided he is convicted thereof by court martial and as the result of such conviction is dismissed or dishonorably discharged from the service of such military or naval forces: Provided, That notwithstanding loss of nationality or citizenship or civil or political rights under the terms of this or previous laws by reason of desertion committed in time of war, restoration to active duty with such military or naval forces in time of war or the reenlistment or induction of such a person in time of war with permission of competent military or naval authority, prior or subsequent to January 20, 1944, shall be deemed to have the immediate effect of restoring such nationality or citizenship and all civil and political rights heretofore or hereafter so lost and of removing all civil and political disabilities resulting therefrom; * * * "

By Section 20, Article VIII of the Constitution of 1945, citizenship in the United States is a qualification for voting in Missouri.

By Section 8 of Article VII of the Constitution, 1945, no person may be elected or appointed to any civil or military office in this state who is not a citizen of the United States.

Inasmuch as these rights are dependent upon citizenship in the United States, the loss of such citizenship would deprive a person of such rights, regardless of the manner in which the citizenship was lost. See Huber v. Reiley, 53 Pa. 112.

Conclusion.

Therefore, this department is of the opinion that a conviction by court-martial, followed by sentence to confinement in disciplinary barracks and dishonorable discharge, does not affect the civil rights of the person convicted, except in case of conviction for desertion in time of war, conviction for such offense having the effect of forfeiting citizenship in the United States of the person convicted and thereby depriving him of such rights as are dependent upon such citizenship, including, in Missouri, the right to vote and the right to be appointed or elected to any civil or military office in this state.

Respectfully submitted.

ROBERT R. WELBORN Assistant Attorney General

APPROVED:

J. E. TAYLOR Attorney General

RRW:ml

DOG LICENSE LAW:

Money derived from dog licenses and placed in "County Dog License Fund" may be used for payment of claims arising from damages sustained by livestock or poultry even though such claims accrued after the voters of the county voted to repeal the license tax on dogs.

August 12, 1949.

8/17/49

Senator Harry J. Revercomb Seventeenth District Missouri Senate Jefferson City, Missouri



Dear Senator:

We are in receipt of your letter in which you request an opinion of this department. Your letter is as follows:

"Would appreciate your rendering an opinion as to the disposition of funds in the treasury of the various counties where the DOG LAW ACT no longer exists.

"There was a surplus of \$800.00 in the DOG FUND in one particular county when this law was voted out in 1944.

"Would like to know if current claims can be paid from this fund."

Article 13, of Chapter 103, R.S.A. No., 1939, which embodies sections 14546 to 14558a inclusive, sets up a local option dog tax law. Section 14558 provides for the effectiveness of the dog tax law in any one of the several counties upon adoption thereof by a vote of the people. Section 14558a provides for the repeal of said law insofar as its applicability in any one county is concerned, said repeal to be accomplished by a vote of the people of said county. Section 14547 provides for the amount to be paid for dog licenses. Section 14548 provides among other things for the disposition of the tax money accruing from such tax in any one county, and is in part as follows:

"* " " The treasurer of the county shall set any and all sums so received apart in a separate fund to be known as a "county dog license fund," and such fund shall be used only for the purpose of compensating persons who have suffered loss or damage through injury or killing by dogs of any livestock or poultry owned by them and located in said county at the time of such injury or killing * * * * * * * *

We gather from your letter that the particular situation to which you refer is one in which by a vote of the people of a given county the dog tax law was adopted and made effective and in which after it became effective, money was placed in the "county dog license fund" and in which thereafter the people of the county voted to repeal the license tax on dogs and, in which, after the repeal of the license tax on dogs had been accomplished by a vote of the people, there remained money in the county dog license fund which was not needed for the payment of claims which accrued before the aforesaid repeal, and is at the present time unused.

We understand your question then to be whether this money now in said fund and which was produced by the dog license law before its repeal can be used for the payment of claims for damages to livestock or poultry which accrued after the repeal of the license tax on dogs.

We are unable to find any decision of the Supreme Court or the Court of Appeals of this State throwing any light upon this particular question, and we are, therefore, resorting to a consideration of the question on the basis of what we consider the most logical interpretation of the law as embodied in the statutes above cited.

We direct your attention to the fact that the only things that the statutes provided must be voted upon were the question as to whether or not a license tax on dogs should be created, and the question as to whether or not the license tax on dogs should be repealed. We believe that it is significant that the statute did not provide for a vote by the people on the question of the disposition of the money accruing from the sale of licenses.

We are of the opinion that when in Section 14548, above cited, the lawmakers provided that the money accruing from the sale of the license, with the exception of a 10% fee paid therefrom to the county clerk, should be placed in a fund within the county treasury to be known as the "County Dog License Fund, " and when the lawmakers in said section also provided that the money in said fund was to be used for the payment of claims resulting from damage to livestock or poultry inflicted by dogs, it was the intent of the legislature that the money in said fund was to be used only for the purpose specified, and we are of the further opinion that since there was no provision for a vote of the people on the question of the disposition of the money, the mere fact that the legisla-ture provided that they might by their votes repeal the license tax on dogs does not evidence any intent on the part of the legislature that by said repeal any change in the disposition of the monies of the county dog license fund should be accomplished, and we are of the opinion that said county dog license fund stands undisturbed by the repeal of the license tax on dogs, and also that the provision in said section 14548 that "such funds shall be used only for the purpose of compensating persons who have suffered loss or damage through injury or killing by dogs of any livestock or poultry owned by them and located in said county at the time of such injury or killing " " "," stands unaffected by the repeal of the license tax on dogs, and we are, therefore of the opinion that any claimant who has suffered a loss to his livestock or poultry which comes within the provisions of the act above quoted, is entitled to be compensated from whatever remains of the "county dog license fund", regardless of the fact that the people have repealed the license tax on dogs by their votes.

CONCLUSION.

We are accordingly of the opinion that current claims of the nature described by section 14548 above cited can be paid from the "County Dog License Fund" until such time as said fund shall be entirely exhausted.

Respectfully submitted,

APPROVED:

SAMUEL M. WATSON Assistant Attorney General

J. E. TAYLOR

Attorney General

ELECTIONS: . Tax levy election not invalid because only one polling place was designated by county court.

December 13, 1949

12/15/49

Honorable Harry J. Revercomb Senator, 17th District Capitol Building Jefferson City, Missouri

Dear Sir:

Your recent request for an official opinion has been assigned to me to answer. Your request is thus stated:

"I have been asked by a very good friend of mine who is a county official to request an opinion from your office on the following:

"This particular county is a 3rd class county under township organization. Some time ago a special election was held in one of the townships in this county submitting to the voters of the township the question of levying an additional 35¢ tax for road and bridge purposes. As it was a special election the township board decided to vote at only one polling place in the township. In every other manner the election was held as provided by law. Now certain opponents of the tax contend that the election was invalid because there were not 3 polling places in three different precincts.

"Will you please let me have your opinion as to the legality of the election in view of the above statement and mail to my office in Jefferson City."

This election, we assume, was called and held under an Act found in Laws of Missouri, 1945, page 1478. This Act states:

"Whenever ten or more qualified voters and taxpayers residing in any general or special road district in any county in this state shall petition the county court of the county in which such district is located, asking that such court call an election in such district for the purpose

of voting for or against the levy of the tax provided for in the second sentence of the first paragraph of Section 12 of Article X of the Constitution of Missouri, it shall be the duty of the county court, upon the filing of such petition, to call such election forthwith to be held within 20 days from the date of filing such petition. Such call shall be made by an order entered of record setting forth the date and place of holding such election, the manner of voting and the rate of tax the court will levy, which rate shall not exceed thirty-five cents on the hundred dollars assessed valuation on all taxable real and tangible personal property in the district. A copy of such order shall be published in two successive issues of any newspaper published in such district, if any, and if no newspaper is published in such district, three certified copies of such order shall be posted in public places in such district. The first publication in said newspaper and the posting of such notice shall be not less than ten days before the date of such election. Such court shall also select one or more judges and clerks for such election to receive the ballots and record the names of the voters."

Your question is whether the above election was invalid because there were not three polling places in three different precincts in this township.

You will note that the Act, cited above, states that "such call (by the county court) shall be made by an order entered of record setting forth the date and place of holding such election." (Supplementing your opinion request you have informed us orally that the election was called by the county court in compliance with the Act cited above, and that where you state in your letter that the township board decided to vote at only one polling place in the township, that this was simply a recommendation by the board to the county court and that the order for holding the election at only one place was made by the county court.)

This Act clearly gives the county court the right to designate the place of voting. We believe that under this Act the court could designate more than one place if it thought this to be necessary, but that this is a matter within the court's discretion. In the exercise of this discretion in the instant case the court chose one place only, which the Act clearly gives them the right to do.

Upon this point we call your further attention to the case of Armantrout v. Bohon, 162 S.W. (2d) 867. There the court said: (1.c. 870, 871 and 872)

"The allegation which the appellant deems conclusive is that only one voting precinct was designated or provided for the City of Hannibal and 'as a result many people who would have voted for her were not given the privilege and opportunity of voting and exercising their rights under the laws of the State of Missouri. : Omitting all the formal prerequisites which are well stated the notice says: 'That it was shown by the official canvass of the votes returned to the County Clerk of the Marion County Court that a total of 4347 persons voted at said election. (Contestee received 2241 votes and contestants received 2106 votes.) That the records * * * * * further show that there were 50 voting precincts in Marion County for said election. The record of said court further shows that there was only one voting precinct provided for the entire City of Hannibal and adjacent and outlying territory, to wit, at the Hannibal Court of Common Pleas Court House in the City of Hannibal, Missouri. And further, that of the entire total vote cast, to wit 4347, a vote of 2141 or approximately one-half of the total vote cast was * * *at the one voting precinct. * * *

* * * * * * * * *

"As the appellant suggest, 'elections should be so held as to afford a free and fair expression of the popular will.' State ex inf. McKittrick v. Stoner, 347 Mo. 242, 146 S.W. (2d) 891, 894. But 'elections are not lightly set aside' and there is a vast difference in passing on the rules and regulations regarding the conduct of an election before the election is held and after. 29 C.J.S., Elections, Sec. 249, p. 360; 18 Am. Jur., Sec. 206, p. 319. As a general rule an election will not be annulled even if certain provisions of the law regarding elections have not been strictly followed in

in the absence of fraud. State ex rel. Miles v. Ellison, supra. As to whether the election was conducted in accordance with the law the matter is aptly covered in Breuninger v. Hill, 277 Mo. 239, loc. cit. 247, 210 S.W. 67, loc. cit. 69: 'A first essential, therefore, in the determination of the matter at issue, is whether any of the mandatory provisions of the Constitution or statutes regulating the rights of voters and the calling and conduct of the election, have been violated.

"As we understand it, the appellant does not contend that any mandatory law, constitutional or statutory, was violated and we are unable to find any such violation from her allegations. The quoted statute (Sec. 10483, R.S. Mo. 1939, Mo. R.S.A. Sec. 10483) says the voting shall be 'at such convenient place or places * * * as the board may designate. It may at the option of the board be held at the same time and place as city elections are held in certain counties. But none of these provisions may be construed as mandatory. It does not appear that any city elections were being conducted at the time. There are times conceivably, when one voting place in Hannibal would be adequate for the submission of school matters to the voters of the district, although we doubt that to be the case when there is a contest over the office of county superintendent. But even so, we cannot say that the board's designation of only one voting place in that district was a violation of any mandatory provision of the law, even though it did not provide places easily accessible and convenient to the voters. The board may not have used the best judgment in selecting voting places but that only one place was designated, in this instance, and under the circumstances, is not such an abuse of their discretion, or disregard of the election laws that the election may be invalidated for this reason. 18 Am. Jur., Sec. 113, p. 251; Kerlin v. Devils Lake, 25 N.D. 207, 141 N.W. 756, Ann. Cas. 1915c, 648. See the irregularities complained of and held not to invalidate the elections in State ex rel. Muns v. Hackmann, 283 Mo. 469, 223 S.W. 575; Breuninger v. Hill, supra; State ex rel. Marlowe v. Himmelberger-Harrison

Lumber Co., 332 Mo. 379, 58 S.W. (2d) 750;
State ex inf. Mansur v. McKown, 315 Mo.
1336, 290 S.W. 123. In city elections
where the statute or ordinance specified
four wards and a polling place was provided
in only one it has been held the election
was valid. State ex rel. Brown v. Town
of Westport, 116 Mo. 582, 22 S.W. 888;
Lebanon Light & Magnetic Water Co. v.
City of Lebanon, 163 Mo. 246, 63 S.W. 809.
Or, conversely, to have four voting places
when the ordinance says one does not invalidate
the election. State ex rel. Town of Canton
v. Allen, 178 Mo. 555, 77 S.W. 868. For
allegations of conduct in such disregard of
the law as to invalidate the election see State
ex rel. Miles v. Ellson, supra; State ex inf.
McKittrick v. Stoner, supra."

CONCLUSION

It is the opinion of this office that the instant election was not invalid because only one polling place was provided.

Respectfully submitted,

HUGH P. WILLIAMSON Assistant Attorney General

APPROVED:

J. E. TAYLOR Attorney General DEN'CAL HYGIENISTS:

Application of sodium fluoride by employees of United States Public Health Service not a violation of Missouri Licensing Law.

January 29, 1949

2-1-49



Dr. Reuben R. Rhoades Secretary, Missouri Dental Board Central Trust Building Jefferson City, Missouri

Dear Sir:

We have received your request for an opinion of this department, which request is as follows:

"The Missouri Dental Board would like an opinion as to the interpretation of the dental hygienists law, being House Bill 105 of the 64th General Assembly, found on pages 269 to 277 of Laws of Missouri, 1947.

"The United States Public Health
Service is using a mobile dental unit
in some of the counties of Missouri,
employing a dentist and two dental
hygienists, employees of the United
States Public Health Service. The
idea of this unit is to clean the teeth
of children and apply a solution of
sodium fluoride, for the prevention
of decay. This program is a national
program and congress has appropriated
thousands of dellars for its operation
and is being sponsored here in Missouri
by the Missouri State Department of
Health.

"The question has been raised, if the dental hygienists are violating section 1 (a) of the Hygienist Act, which defines the operative procedure authorized to be performed by dental hygienists. Our hygienist's law does not permit the application of this solution. We were

of the opinion that all three of these persons are federal employees and have a legal right to operate in Missouri as long as this mobile unit is using this method as a demonstration and immunization to prevent decay and not charging a fee for their services.

"These mobile units are operating in many states, some of the states have amended this law to permit the application of sodium fluoride and some have not. We will be pleased to have your opinion on this matter * * *"

Section 1 of the Missouri Dental Hygienist's Licensing Act, Laws of Missouri, 1947, Volume I, page 269, provides:

"Such persons as shall become, and remain, duly licensed and authorized dental hygienists, under the provisions of this Act, may lawfully practice the operative procedures of dental hygiene under the continuous supervision and inspection of such legally qualified and licensed dentists as shall become, and remain, authorized, under the provisions of this Act, to engage such dental hygienists.

"(a) As used in this Act, the term
'operative procedures of dental hygiene'
shall mean the treatment of human teeth
by removing therefrom stains and calcareous deposits, by removing accumulated accretions from directly beneath
the free margin of the gums, and by
polishing the exposed surface of the
teeth; and the term 'operative procedures of dental hygiene' shall not include the diagnosis of, or the performance of any other operative procedure on, any other part or condition
of the teeth, meuth or jaw."

As we understand the procedure involved, a child's teeth are first examined by the dentist and they are then cleaned by a hygienist who also applies a sodium fluoride solution; the application of the solution is done with a spray and the

solution is allowed to dry for four minutes; the cleaning and application of the solution are under the direction and supervision of the dentist. The actual application of the solution, after the teeth have been properly cleaned, does not involve any particular degree of skill.

Inasmuch as the statute to which you have referred specifically authorizes a dental hygienist to clean teeth, we feel to construe the statute to mean that the hygienist may not, after having cleaned the teeth, perform the relatively simple procedure of applying a solution of sodium fluoride would be an unnecessarily strict construction which would not tend to promote the purpose of the statute by protecting the public. In addition, we feel that the mere application of the solution would not be regarded as an "operative procedure" within the meaning of the section above quoted.

There is also the question of whether or not these hygienists are in any respect subject to the Missouri Hygienists's Law. They are employees of the United States Public Health Service. The program is being carried out pursuant to an appropriation of \$1,000,000 by the second session of the 80th Congress (Chapter 472, Public Law 646). The report of the Appropriation Committee in the House of Representatives (Report No. 1821) contained the following comment concerning the program:

"Assistance to States, general .-- The accompanying bill includes \$1,000,000 to enable the Public Health Service to set up facilities to work in cooperation with the States, dental societies, and other organizations to demonstrate to the dental profession and the people of America generally the efficacy of the relatively new procedure of so-called topical application of sodium fluoride to the teeth as a preventative against dental decay. It will be recalled that in connection with consideration of the Labor-Federal Security appropriation bill, 1949, the committee evidenced a good deal of interest in this research accomplishment and expressed its intense desire to see that procedure was made widely known. The program envisioned by the original budget estimate was largely predicated on a new grant-in-aid program to enable the States to inaugurate a wide-

scale program of applying the new treatment to children's teeth. The committee felt that it was neither essential nor desirable to embark on a new grant-in-aid program out of the Federal Treasury in order to reap full benefits from this new research development but, rather, that a widespread and intense demonstration and publicity program would be more appropriate and at the same time fully effective. Accordingly, on the basis of the original presentation, the committee approved in H. R. 5728 only sufficient funds to provide for continuation of the researches and demonstrations currently being carried on in this field.

"In view of widespread public interest the committee subsequently decided to hold further hearings looking to development of a more appropriate, economical, and effective way to accomplishing the purpose. To assist in arriving at the proper determinations, the committee had the benefit of testimony from representatives of the American Dental Association, the National Congress of Parents and Teachers, the State and Territorial Health Officers Association, and the National Grange. As a result of this further consideration, the committee has determined that field demonstration units should be established to operate in the State under a close cooperative arrangement with State health departments, dental societies and organizations and other organizations. It would be the purpose of these units -- roughly one mobile unit for each State -- to demonstrate to dentists. dental hygienists, State and local health department personnel, etc., the correct techniques of making sodium fluoride applications to the teeth, to serve as a training mechanism for public health personnel, and generally to publicize and promote interest in the procedure.

"It may be stated that this proposal is in full accord with the views of the Council

Association. In recommending the appropriation of \$1,000,000 additional to implement this program of demonstration, it should be clearly understood that the committee does not view this program on the part of the Public Health Service as a permanent fixture. Rather, it is the view of the committee that if the demonstration facilities are properly managed they will thoroughly cover the several States and make the procedure so widely known and available that the Public Health Service can and should withdraw from active participation of the type herein provided for."

This appropriation was made pursuant to the power of Congress to appropriate money for the general welfare (U. S. Constitution, Article I, Section 8). See United States v. Butler, 297 U. S. 1, 65, 80 L. Ed. 477, 56 Sup. Ct. 312, and Helvering v. Davis, 301 U. S. 619, 640, 81 L. Ed. 1307, 57 Sup. Ct. 904.

The determination of whether or not a particular purpose is a matter of general welfare is a question largely within the discretion of Congress (Helvering v. Davis, supra). A determination by Congress that the purpose here involved is a matter of general welfare would not likely be held arbitrary and clearly wrong. See Oklahoma City v. Sanders, 94 Fed. (2d) 323; School Dist. No. 37, Clark County, v. Isackson, 92 Fed. (2d) 768.

The immunity of federal employees from state regulation in the performance of their duties is well settled. In the case of Johnson v. Maryland, 254 U. S. 51, 1.c. 57, 65 L. Ed. 51, 41 Sup. Ct. 16, the court said:

"It seems to us that the immunity of the instruments of the United States from state control in the performance of their duties extends to a requirement that they desist from performance until they satisfy a state officer, upon examination, that they are competent for a necessary part of them, and pay a fee for permission to go on. Such a requirement does not merely touch the government servants remotely been performed. # # #"

That principle would appear to be applicable here. The Federal government having determined that the employees in question are competent to perform the duties involved, the state would have no power to interfere.

Conclusion.

Therefore, it is the opinion of this department that dental hygienists employed by the United States Public Health Service may, in carrying out a program of the United States Public Health Service to demonstrate the procedure for the application of sodium fluoride for the prevention of dental caries, apply such solution in this state without violating the Missouri Dental Hygienist's Licensing Law (Laws of Missouri, 1947, Volume I, page 269).

Respectfully submitted,

ROBERT R. WELBORN Assistant Attorney General

APPROVED:

J. E. TAYLOR Attorney General

RRW:ml Enc.

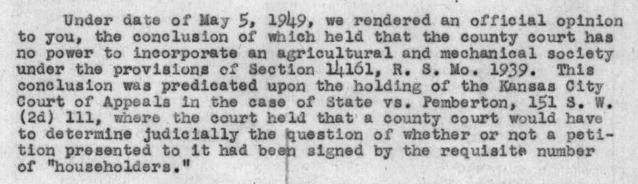
Cc: Dr. E. B. Owen Dr. C. E. Presnell COUNTY FAIR: County court does have power to order incorporation COUNTY COURT: of agricultural and mechanical societies under INCORPORATION: provisions of Section 14161, R. S. Mo. 1939.

and the same

June 6, 1949

Honorable John M. Rice Prosecuting Attorney Newton County Neosho, Missouri

Dear Sir:



Since the date of rendition of the above referred to opinion, the Supreme Court of Missouri, en banc, decided the case of State ex rel. Lane vs. Pankey, et al., No. 41324 (not yet published). The court in this case had before it in prohibition proceedings the question of whether or not the county court has the right to entertain proceedings for the establishment of a change in a public road. The court said:

" * * The new Constitution, as construed in the Rippeto case and as we now construe it, invalidates no provision of existing statutes relating to the authority of county courts over public roads except such as purport to authorize the county court to exercise judicial power. A county court can no longer adjudge the compensation to be paid for lands to be taken for road purposes nor render judgment divesting title from the owners thereof. But such court may take all statutory steps to determine the necessity, location, width and type of construction of public county roads, to determine whether same shall be constructed in whole or in part at county

expense, and, when title has been legally acquired, to perform the administrative functions of supervising the construction and maintenance of such roads."

It is to be noted that Sections 8473 and 8475, R. S. Mo. 1939, both of which statutes were under consideration by the court in the Pankey case, supra, contained references to "freeholders," Section 8473 requiring that the petition for establishment of a public road shall be signed by at least twelve "freeholders," and Section 8475 providing that a remonstrance must be signed by twelve or more "freeholders" residing in the municipal township or townships through which it is proposed to establish a public road, three of whom shall reside in the immediate neighborhood.

It is apparent that under the provisions of Section 8473, the court must determine that a petition has been signed by the requisite number of "freeholders" before the court acquires jurisdiction of the petition, and that the remonstrance provided for in Section 8475 must be signed by the requisite number of "freeholders" before the court may pass upon such remonstrance. In view of the quoted language from the Pankey case, we believe that a determination of the fact that the requisite number of "freeholders" signed the petition for incorporation of the agricultural and mechanical society is not a judicial act, but is an administrative act which may be validly performed by the county court. Our opinion to you dated May 5, 1949, is, therefore, withdrawn.

CONCLUSION

It is the opinion of this department that a county court does have power to incorporate an agricultural and mechanical society under the provisions of Section 14161, R. S. Mo. 1939.

Respectfully submitted,

APPROVED:

C. B. BURNS, JR. Assistant Attorney General

J. E. TAYLOR Attorney General

CBB:VLM

CIRCUIT COURTS: COUNTY COURTS: County, through the sheriff and county court, is under a duty to furnish to the Circuit Court Judge, upon his order, the facilities necessary for the holding of court and the administration of the court held in such county.

September 15, 1949

Filed: #75

Hon. John M. Rice Prosecuting Attorney Newton County Neosho, Missouri

Dear Mr. Rice:

We have received your request for an opinion of this department. Your opinion request is as follows:

"In this judicial circuit, the 24th, when Judge Johnson took office in February he was not provided with office space, equipment, postage, etc. At that time the court house was filled and the county court had no space available. Judge Johnson secured office space outside the courthouse here in Neosho and, after presenting the problem to the members of the county court in each of the four counties of the judicial district, filed a statement with each county court for his expenses for the months of February, March, April and May, 1949. That statement covered office rent, telephone, electricity, postage, stationery and supplies-incident to carrying out his duties as circuit judge. The total expense was divided among the four counties in proportion to population, on the same rates as the court reporters expenses are divided.

"Is Newton County, through the County Court, or other officials, under a duty to furnish to the circuit judge, who resides at the county seat, office space in the court house and to furnish electricity, telephone, postage, stationery and office supplies? If so, and if space for such office is not available in the court house, is the county obligated to reimburse the circuit judge for this county's proportionate share of his expenditures for said items?"

Your request necessitates the answering of the following questions:

- 1) Is a county wherein the court is held under a duty to furnish the circuit court judge office space and office supplies?
- 2) If such space and supplies are not available in the courthouse and are not furnished by the county at some location outside the courthouse, is the county then under a duty to reimburse the said judge for the expenditures made by him in this regard?

There is no applicable statute that completely answers the questions herein involved, nor or there any cases directly in point. However, there are a few cases in which the same questions have arisen in respect to county officers. In these cases it has been decided that the county must provide such official with adequate office space and equipment.

In the case of Ewing v. Vernon County, 216 Mo. 681, 1.c. 692, the court said:

"* * * There is even no word relating to a room in which to keep his office or fuel to heat it. But when we read other provisions of the general statutes relating to building a courthouse and heed the underlying theory that county offices should be kept there, all questions relating to a room vanish; * * * * * * * * "

Another case dealing with precisely the same circumstances is Buchanan v. County of Ralls, 283 Mo. 10, 1.c. 17, wherein the court gave its opinion as follows:

"* * * * if the appellant failed to provide for the use of respondent reasonably suitable space in the courthouse or elsewhere in the county seat in which to maintain her office and transact her official business, then respondent had the right to provide such office, and to provide heat, light and janitor service therefor, and that the county is bound to pay the reasonable cost of the same."

There are no statutes in this state which specifically enumerate the facilities which are deemed to be necessary for the proper conduct of the business of the circuit court, however there are two statutes which make provision for the furnishing of the necessary facilities to the court and the manner in which the

same are to be furnished.

Section 2034 Mo. R.S.A., 1939, provides:

"The several sheriffs shall attend each court held in their counties, when so directed by the court; and it shall be the duty of the officer attending any court to furnish stationery, fuel, and other things necessary for the use of the court whenever ordered by the court."

The above quoted statute makes it the duty of the sheriff attending the court to furnish to the said court stationery, fuel and other things necessary for the use of the court whenever ordered by the court. The words "whenever ordered by the court" can be construed to have only one interpretation, namely, that the court shall decide what is necessary for the proper conduct of its business and the court will then order the sheriff to provide the same to it.

Section 2035 Mo. R.S.A., 1939, which provides for the auditing and certification for payment of such accounts by the court is as follows:

"The court shall audit and adjust the accounts of the officer attending it, made pursuant to this chapter, and certify the same for payment."

An early revision of Section 2035, Mo. R.S.A., 1939, which is the same in substance as the present statute, was construed in the case of State of Mo. ex rel. W. B. Hensick v. A. J. Smith, Auditor, 5 Mo. App. 427, page 429, as making the court's allowance of the account final. In this case the court said:

"* * * * The general law directs (Wag. Stat. 431, sec. 4) that all accounts for expenditures accruing in courts shall be paid out of the treasury of the county in which the court is held, in the same manner as other demands, and (Wag. Stat. 424, secs. 41,42) shall be audited and adjusted by the court in which the services were rendered. That tribunal has the means of determining the correctness of the account, as to which the auditor can know nothing; and to that tribunal alone have

And again in the case of State ex rel. McNeil v. St. Louis County Court, 42 Mo. 496, wherein the court expressed itself as follows (1.c. 500):

"* * * * The general law directs all such accounts to be audited, adjusted, and certified for payment by the court in which the services are rendered and the articles furnished. Such tribunal is presumed to have the means of determining almost with positive certainty as to the correctness of the items of such an account. What necessity can be shown for requiring a claim thus audited and allowed to undergo an examination by the auditor? It will not be pretended that a claim for similar services in the County Court itself would have to pass through the hands of the same officer before the County Court would be authorized to order a warrant for its payment."

From the foregoing quoted statutes and cases it follows that it is for the court alone to determine what things are necessary for its use and then to order the sheriff to furnish the same to the said court and after such things are furnished the court shall audit and adjust the account, then certify the same for payment.

Provision for the ultimate payment of the aforementioned accounts is made by Section 2102, Mo. R.S.A., 1939, as follows:

"All expenditures accruing in the circuit courts, county courts and probate courts shall be paid out of the treasury of the county in which the court is held, in the same manner as other demands."

(Underscoring ours.)

Therefore, as the above statute requires that all expenditures accruing in the circuit courts, county courts, magistrate courts

and probate courts, except salaries and clerk hire, be paid out of the treasury of the county in which the court is held, in the same manner as other demands, it is apparent that all expenditures made by the circuit court in the carrying on of its duties and business as a circuit court must be borne by the county wherein the court is held.

The fact that the judge in the instant case has not complied with all the preliminary requirements before taking it upon himself to furnish the electricity, telephone, postage, stationery, office supplies and office space to the court would not give rise to an estoppel against the said judge. This particular question was ruled upon in Buchanan v. County of Ralls, 283 Mo. 10, 1.c. 17, wherein the court held the same to be a question of fact, saying:

It will be noticed that the above authorities and text specifically point out that each individual county wherein the court is held is under a duty to furnish to the court the facilities necessary for the transaction of the business of the court. Hence, it follows that inasmuch as the office space herein involved is located in Newton County, and said office space is necessary for the transaction of the business of the court, in Newton County, that said Newton County is under a duty to pay the entire rent of said office space as well as paying any and all other expenditures which were made and were necessary for the transaction of the business of the court in said Newton County. The other counties herein involved would be under a duty to pay all expenditures made and necessary for the transaction of the business of the court in the respective counties. It would seem unreasonable to expect the judge to keep exact account of such items as stationery used for the transaction of business in the different counties. Expense for such items might reasonably be divided among the four counties.

CONCLUSION

It is therefore the opinion of this department that Newton county is under a duty to provide the Circuit Court with the necessary facilities to enable the said court to conduct its business as a court in such county, and failing in this respect the county shall pay upon the order of the court all such expenses as are necessary for the holding of court and the administration of the court in such county, which in the instant case would include the entire rent of said office space as well as all other expenditures which were made and were necessary for the transacting of the business of the court in said Newton County.

Respectfully submitted,

PHILIP M. SESTRIC Assistant Attorney General

APPROVED:

J. E. TAYLOR ATTORNEY GENERAL

PMS: A

TAXATION: In computing the average rate of taxation to be RAILROADS: levied against railroads and utilities for

SCHOOLS: school purposes, the local rates of all school districts in the county, including those not wholly within the county, should be added together and divided by the total number of school districts in the county, including those

districts not wholly within the county.

October 5, 1949

Hon. John M. Rice Prosecuting Attorney Newton County Neosho, Missouri

Dear Sir:

We have your recent request for an opinion, which reads as follows:

> "I would appreciate an opinion from your office on the following matter:

"Section 11280.17, Revised Statutes of Missouri, 1939, sets out the manner of levying taxes for school purposes against railroad companies and Section 11295 provides for taxation of other utilities in the same manner as provided for taxation of railroad property. Section 11280.17 provides, in part, that:

"'The several County Courts shall ascertain from the returns in the office of the County Clerk the average rate of taxation levied for school purposes * * by the several local school boards or authorities of the several school districts throughout the County. Such average rate for school purposes shall be ascertained by adding together the local rates of the several school districts in the County and by dividing the sum thus obtained by the whole number of districts levying a tax for school purposes * * *'

"In this County there are five school districts which overlap into another County, in other words, we have 73 districts but only 68 of them are entirely in Newton County. In each of the five overlapping districts the school building itself is in another County, but a substantial part of the district is in Newton County.

"In computing the average rate of taxation to be levied against railroads and utilities, is the proper procedure to add together the local rates of the 73 school districts and divide the sum thus obtained by 73, or to add together the local rates of the 68 school districts wholly within Newton County and divide the sum thus obtained by 68?"

The statutes relating to this problem are:

- (1) Section 11295, Laws of Missouri, 1945, page 1853, which provides that all property belonging to bridge, telegraph, telephone, electric power and light, electric transmission, pipe line and express companies shall be assessed in the same manner as is provided for the property of railroad companies;
- (2) Section 11280.17, page 1831, id., which provides for the assessment of railroad property for all purposes, except schools and public building;
- (3) Section 11280.18, page 1832, id., which provides for the assessment of railroad property for the levying of school taxes, here set out, in part, as follows:

"For the purpose of levying school taxes, and taxes for the erection of public buildings, and for other purposes, in the several counties of this state, on the roadbed, rolling stock and movable property of railroads in this state, the several county courts shall ascertain from the returns in the office of the county clerk the average rate of taxation levied for school purposes, and also the average rate of taxation levied for the erection of public buildings, and for other purposes, each separately, by the several local school boards or authorities of the several school districts throughout the county. Such average

rate for school purposes shall be ascertained by adding together the local rates of the several school districts in the county and by dividing the sum thus obtained by the whole number of districts levying a tax for school purposes, * * *"

This statute first became law in 1875, and is found in almost identical wording in the Revised Statutes of 1879, 1889, 1899, 1909, 1919, 1929 and 1939. Cases footnoted under the various acts show that the particular problem you raise, i.e., the question of overlapping school districts, has never been adjudicated. The method of computation (adding together the local rates of the school districts in the county and dividing by the total number of school districts) has remained totally unchanged throughout all the various re-enactments. In 1945 this statute was repealed, but the new act again contains the same wording as all the preceding ones. The method of rate computation is precisely the same. Thus, Section 11280.17, as relates to the problem of overlapping school districts, has never been discussed by the courts of this state.

Your question then will have to be answered in two ways, (1) by ascertaining the meaning of the wording of the section itself and (2) by cases approaching, but not on, the exact point.

The most important word in the section is the word "in," as used in "the local rates of the several school districts in the county." The word "in" is synonymous with the word "within." Mackay v. Commonwealth Casualty Co., 224 Mo. App. 1100. "The word 'in' within the bounds of." Board of Freeholders v. Central R. R. Co., 68 N. J. Eq. 500. words 'within any county or precinct' must be construed to mean and include not only the entire county or precinct but any definite or prescribed portion thereof." Paul v. State, 48 Tex. Civ. App. 25. "Within said county refers to business originating or terminating in or passing through the offices in said county and cannot be construed to refer to business wholly between points within the county." State v. Western Union Tele. Co., 42 Mont. 445. "The phrase 'within the county' includes roads which may be partly within any of the municipalities of the county." White v. County Court of Mercer Co., 76 W. Va. 727. "The use of the words 'within this state' cannot by any fair construction be held to limit transportation of freight wholly within the state." People v. Wabash R.R. Co., 104 III. 476.

It seems, then, that the most reasonable construction of the meaning of the word "in" or the word "within" in any geographical or political area is that it means partially in or not wholly within the area. Had the Legislature intended that the counties should exclude, for the purposes of average tax rate calculation, any school district which was partially in another county, it could have simply inserted the word "wholly" before the word "in." The absence of this limiting adjective strongly indicates that no such limitation was intended by those who wrote the law.

Thus, as far as the actual wording of the statute is concerned, it appears that, for purposes of making the railroad tax calculation, the tax rates of all the school districts in the county, plus those only partially or not wholly within the county, should be averaged in.

There is only one case which throws some light on the particular question before use. In State ex rel. Brown v. Mo. Pac. R. R. Co., 92 Mo. 154, the court sets out the statute in full and discusses it as follows:

" * * * It is certainly within the power of the legislature to authorize the imposition of taxes for school purposes on the property of defendant, and considering the nature of its property, and the fact * * * that its aggregate value is made up because of its continuity, that the portion of a railroad * * * would be of little or no value, considering these things in connection with the further fact that the rolling stock of defendant * * * cannot be localized in any one county, it being, from its very nature, constantly changing from one county to another * * *"(Underscoring ours.)

This case, one of the first to discuss the section, thus indicates that the school districts, rather than the county lines were to be of paramount determinative force in arriving at tax rates.

CONCLUSION

It is the opinion of this office that in computing the average rate of taxation to be levied against railroads and

utilities that the proper procedure is to add together the local rates of all the school districts in the county, including those districts only partially or not wholly within the county, and to divide by the whole number of such districts, including those not wholly within the county. Thus, in a county having sixty-eight school districts wholly within the county and five partially within the county, the proper procedure is to add together the local rates of all seventy-three school districts and divide the sum thus obtained by seventy-three.

Respectfully submitted,

H. JACKSON DANIEL Assistant Attorney General

APPROVED:

J. E. TAYLOR Attorney General TAXATION: ASSESSORS: Duty to call on and require taxpayer to return assessment list; but not required to view property or prepare list except where none is returned. Assessor may not require taxpayer to appear before him at designated time or place in county in lieu of his official call upon taxpayer.

December 21, 1949

Honorable Allen Rolston Prosecuting Attorney Schuyler County Lancaster, Missouri FILED

14/50

Dear Sir:

This is to acknowledge receipt of your recent letter requesting an opinion of this department, which request reads as follows:

"I would like your opinion on the following questions relating to the duties of the county assessor in a county of the fourth class.

"First: is the county court required to furnish and equip an office for the county assessor?

"Second: In making the assessment, is it the duty of the assessor to call on and take the assessment list of the residents of the county?

"Third: Has the county assessor any authority to require the resident whose assessment is to be made to call on the assessor at some place designated by the assessor in each township: To put this question another way is it the duty of the assessor to personally see and list the property that is to be assessed, or can be require the residents of the county to call on him at a certain place and time to list the property that is subject to taxation? or to put it yet another way, is it the duty of the assessor to travel over the entire county and inspect the property and

call on the taxpayer at his residence?

"Our county assessor has called on me for this information. While I think I can answer his question, I not sure on some of the points, and therefore, would like your opinion on these questions."

From the facts given in your letter it appears that Schuyler County is a county of the fourth class, and your first question is whether it is the duty of the county court to furnish and equip an office for the county assessor.

Under the provisions of Article VI, Section 7 of the Missouri Constitution of 1945, the county court has been given the power to "* * * manage all county business as prescribed by law, * * " In the cases of Bradford vs. Phelps County, 210 SW (2d) 996, and ex rel. Kowats vs. Arnold, 356 Mo. 661, it has been held that county courts no longer have the status of "constitutional courts" exercising juridical powers of courts, but that county courts (since the adoption of the 1945 Constitution) have been reduced to the status of ministerial bodies, with power to manage all of the business of the county.

With reference to the power of the county court to manage all of the county business, Article VI, Section 7 of the 1945 Constitution is similar to that of Article VI, Section 36 of the Constitution of 1875. In discussing certain phases of the county court's powers under said latter constitutional provision, in the case of State ex rel. Mitchell vs. Rose et al., 281 SW 396, it was held to be the duty of the county court to look after the public funds, examine, audit, adjust and settle all accounts to which the county shall be a party.

Although we are unable to point out any specific section of the statutes enjoining on the county court the duty to provide and equip an office for the benefit of the assessor, it appears that the office would not only be a convenience or a necessity to the assessor but that it would be a greater benefit to the residents of the county or others having official business with the assessor. It might be argued that the office would be unnecessary since it is the assessor's duty to call upon resident taxpayers of the county and furnish them with proper blanks for listing property subject to taxation. When it is considered that the calls required to be made are only a small part of the duties of the assessor, it is believed that the other duties of the assessor will in no way lessen the need for an office where the assessor may perform such duties and where the public may find him or his deputies during business hours of the day.

In the case of Ewing vs. Vernon County, 216 Mo. 1.c. 692, in passing upon the duty of the county court of Vernon County to provide office space, equipment and supplies for the recorder of deeds the court said:

"* * * There is not a word in the chapter (chap. 147), relating to providing chairs, desks, pens, ink, stationery, stoves, racks, tables, spittoons, or other office paraphernalia. There is even no word relating to a room in which to keep his office or fuel to heat it. But when we read other provisions of the general statutes relating to building a courthouse and heed the underlying theory that county offices should be kept there, all questions relating to a room vanish; * * *"

In the case of Buchanan vs. Ralls County, 283 Mo. 10, it was held that it was the duty of the county court to provide suitable office space, heat, lights and janitor service for the county treasurer and that upon the failure of the county court to make such provision the county treasurer had the right to secure an office, light, heat and janitor service at her own expense and that the county court is bound to reimburse her for the reasonable cost of same. Also in the case of Harkreader vs. Vernon County, 216 Mo., 696, it was held that the sheriff was entitled to janitor service at the expense of the county and that it was the duty of the county court to reimburse the sheriff for reasonable outlays for such service.

In view of the foregoing constitutional provisions and court decisions to the effect that county officials are to be furnished with suitable office space, equipment and supplies at public expense, our answer to your first question is that it is the duty of your county court to provide and equip an office for the assessor of your county.

Your second question is whether it is the duty of the assessor to call on and take the assessment lists of residents of the county.

In counties aside from those of the first class, the statutory method of procedure for the assessment of real and tangible personal property located in the county is found in Section 10, page 1785 of an act relating to assessors and assessment of property of the Laws of Missouri for 1945. Since your county is one belonging to Class 4, the provisions of this act fully apply. Section 10 of said act reads in part as follows:

"The State Tax Commission shall design the necessary assessment blanks and they, together with the assessment books, shall be furnished by the county clerk at the expense of the county, and shall be turned over to the assessor at least sixty days prior to January 1st of each year. After receiving the necessary forms the assessor or his deputy or deputies shall, except in the City of St. Louis, between the first day of January and the first day of June, 1946, and each year thereafter, proceed to make a list of all real and tangible personal property in his county, town or district, and assess the same at its true value in money in the manner following, to wit: He shall call at the office, place of doing business or residence of each person required by this chapter to list property, and shall require such persons to make a correct statement of all taxable real and tangible personal property in the county owned by such person, or under the care, charge or management of such person, except merchandise which may be required to pay a license tax and except all other property which may be exempted by law from taxation. The person listing the property shall enter a true or correct statement of such property, in a printed blank prepared for that purpose; which statement after being filled out, shall be signed and either affirmed or sworn to as provided in this chapter. The list shall then be delivered to the assessor. * * *"

This section outlines the method of procedure to be followed by the assessor or his deputies in taking assessment lists under ordinary circumstances. When the assessor or his deputy calls at the office, place of business, or residence of the person required to list property and it is found that such person is sick, absent, or has neglected to return the list, or has died prior to such call, then the procedure to be followed in taking the list must be that set out in Section 11 which reads as follows:

"If any person required by this chapter to list property shall be sick or absent when the assessor calls for a list of his property, the assessor shall leave at the office, or the usual place of residence or business of such person, a printed assessment blank and a printed notice, requiring such person to make out and mail or take to the office of said assessor, not more than twenty days from the date of such notice, a sworn statement of the property which he is required to list. If any such person

shall have died prior to the time when the assessor calls for such list, the assessor shall deliver such assessment blank and printed notice to the executor or administrator of such deceased person, and such executor or administrator shall make out and deliver to the assessor such sworn statement of all the property of such decedent. The date of leaving such notice and the name of the person required to list the property shall be carefully noted by the assessor; and if any such person shall neglect or refuse to deliver the statement, properly made out, signed and sworn to as required, the assessor shall make the assessment, as required by this chapter."

Under the provisions of Section 10, supra, it is the duty of the assessor or his deputy to call upon each resident of the county. Said section reads in part as follows: "* * * He shall call at the office, place of doing business or residence of each person required by this chapter to list property, and shall require such persons to make a correct statement * * *"

In attempting to ascertain the exact nature of the duty of the assessor in making these calls, and the meaning the legislature must have intended to give this section, it is necessary that we notice the use made on the word "shall."

Generally the word "shall" used in a statute is given a mandatory meaning and it was so declared in the case of Mau vs. Stoner, 83 Pac., 218, 219.

In the case of State ex rel. vs. Stevens vs. Wurdeman, 295 Mo., 566; it was held that usually the word "shall" indicates a mandate, and, unless there are other things in a statute, it indicates a mandatory statute.

Applying the rule announced in these cases to the law in question it appears that by the enactment of Section 10, it was the intention of the legislature to provide a method of procedure for the assessor to follow in making assessments of real estate and tangible personal property in each county. A duty was imposed upon the assessor to call upon each resident of the county for that purpose. No provision is made in this section for the assessor to do something else in lieu of the call, nor does it leave the matter of making the call within the discretion of the assessor, and we construe the words "shall call," "shall require," as mandatory.

In answer to your second question we submit that it is the mandatory duty of the assessor or deputy assessor to call upon each resident of the county and to require such persons to return an assessment list of all taxable real and tangible personal property owned or controlled by such person.

The first part of your third question is whether or not the assessor has any authority to require the resident whose assessment is to be made to call upon the assessor at some place designated by the assessor in each township in the county. In discussing this question we repeat that Section 10, supra, required a mandatory duty of the assessor or his deputy to personally call upon each resident of the county at his office. place of business, or residence of the persons required by the act to list property and to require them to make a true statement of the real and personal property required to be listed and to return such lists to the assessor. We are unable to find any provisions in Section 10 and we are also unable to find any other provisions of the Act or of any general statutes that would authorize the assessor to require residents of his county to meet him at a designated time and place in each township of said county in lieu of the personal calls he is required by law to make. We therefore conclude that the assessor does not have this authority and that the answer to the first part of your third question is "no."

The second part of your third question is whether it is the duty of the assessor to personally see and list property that is to be assessed or may he require residents of the county to meet him at certain times and places to list property subject to taxation.

We believe that we have sufficiently discussed that part of your question having to do with the assessor's duty to call upon each resident of the county and require him to make a list of property subject to taxation and we will not repeat anything of this nature except to say that the assessor cannot require residents to meet him at any specified time or place in the county but that the law requires him or his deputies to make the call. His duty in this respect will have been performed when he makes one call upon each resident and he is not required to make additional calls.

Under the provisions of Section 11 of the Act, when the assessor makes his official call upon the person required to list property and finds that such person is sick or absent it then becomes the assessor's duty to leave an assessment blank and printed notice at the office, place of business or usual place of residence of such person requiring him to complete the

list and return it to the assessor not more than twenty days from the date of the notice. In the event that the person required to return the assessment list has died prior to the assessor's visit then the assessment blank and notice must be delivered to the executor or administrator of such person and it then becomes the duty of such executor or administrator to make and reutrn the assessment list to the assessor.

The third part of your third question asks whether it is the assessor's duty to travel over the entire county and inspect the property and call upon the taxpayer at his residence.

In view of what has been previously stated herein and for the same reasons we are of the opinion that it is the assessor's duty to travel over the entire county and call at the office, place of business, or residence of each person required to list real or personal property for assessment.

With reference to that part of the question in which inquiry is made as to the duty of the assessor to call and personally inspect the property listed on the assessment blank we wish to discuss this matter more fully.

Section 10, supra, does not require the assessor or his deputy to personally view the property listed on the assessment blank at the time he makes his official call. Said section in part provides: "* * * The person listing the property shall enter a true or correct statement of such property, in a printed blank prepared for that purpose; which statement after being filled out, shall be signed and either affirmed or sworn to as provided in this chapter. The list shall then be delivered to the assessor. * * * This section does not require the assessor or his deputy to be personally present at the time of the signing, affirming, or swearing to the list. While the assessor or deputy assessor may be personally present and may administer the oath to the person making the list, the law does not state that such officer or deputy are the only ones who may administer the oath. The oath may in their absence be administered by other persons. With reference to the administering of such oaths, Section 16 of the Act in part provides:

"Assessors and deputy assessors, county and circuit clerks, notaries public, judges of the county courts, magistrates, and all other judicial officers, are empowered and authorized to administer any oath relating to the assessment of property required by this chapter, * * *"

The only reference made in the entire Act to the assessor personally viewing the property to be assessed is found in Section 14 which reads as follows:

"Whenever there shall be any taxable property in any county, and from any cause no list thereof shall be given to the assessor, in proper time and manner, the assessor shall himself make out the list, on his own view, or on the best information he can obtain; and for that purpose he shall have lawful right to enter into any lands and make any examination and search which may be necessary, and may examine any person upon oath touching the same."

Under the provisions of this section it becomes the duty of the assessor or his deputy to view the property subject to taxation and to list it only when no list has been returned by the person required to return same.

CONCLUSION

In view of the foregoing it is the opinion of this department that the management of all county business has, under the provisions of Article VI, Section 7 of the Constitution of 1945, been vested in the various county courts of the state. That in the management of the affairs of the county, the County Court of Schuyler County has the power and it is the duty of said court to provide and equip an office for each county official of said county, including that of the assessor, at public expense.

It is the further opinion of this department that the duty of the assessor of Schuyler County in calling upon persons required to make and return assessment lists at the office, place of business or residence of such persons and to require them to make and return such lists is mandatory and that the assessor may not require such persons to appear before him at a designated time and place in the county for said purpose. That he is not required to be present at the time the list is prepared, signed and sworn to nor to view the property listed except in those cases where no list has been returned in which latter event it becomes his duty to view the property and prepare the list. He may designate his office or some other place in the county as

the place where the completed lists may be personally delivered or mailed to him without violating any of the provisions of the Laws of 1945 relating to assessors and the assessment of property.

Respectfully submitted,

PAUL N. CHITWOOD, Assistant Attorney General

APPROVED:

Attorney General

PNC:nm

LIBRARY ADVISORY BOARD: STATE LIBRARY:

Money received in trust for films not state money.

February 9, 1949

FILED 77

Mrs. George A. Rozier President State Library Advisory Board Jefferson City, Missouri

Dear Mrs. Rozier:

This department is in receipt of your request for an official opinion which reads as follows:

"On May 20, 1948, the Board of Trustees of the Carnegie Corporation of New York adopted the following resolution:

"'RESOLVED, That, from the balance available for appropriation, the sum of fifteen thousand dollars (15,000), payable \$7,500 in 1947-1948; \$5,000 in 1948-49; \$2,500 in 1949-50, be, and it hereby is, appropriated to the Missouri State Library, for support of a demonstration of film distribution and use.'

"Is the money received under the above appropriation 'state money' so that it must be deposited in the state treasury and be appropriated out by law?"

Section 36, Article III, Constitution of Missouri, 1945, provides, in part, as follows:

"All revenue collected and money received by the state shall go into the treasury and the general assembly shall have no power to divert the same or to permit the withdrawal of monney from the treasury, except in pursuance of appropriations made by law. * * *."

Under the above constitutional provision all money received by the state must go into the state treasury and cannot be withdrawn except by an appropriation. However, the question in your request is, whether the money received from the Carnegie Corporation is money "received by the state" within the meaning of the terms of Section 36, Article III, supra.

Section 14732, Laws of Missouri, 1945, page 1132, provides that the state library "may receive gifts of money, books or other property which may be used or held in trust for the purpose or purposes given."

In order to determine the purpose for which the money was appropriated by the Carnegie Corporation we must look to the proposal submitted by the state librarian to the Carnegie Corporation, which proposal sets forth the conditions under which the grant would be spent, and which proposal was accepted by the Carnegie Corporation when the appropriation was made. The files of the state librarian discloses that Kathryn P. Mier, the then State Librarian, on April 21, 1948, submitted a proposal to the Carnegie Corporation of New York, which proposal, in part, provides as follows:

> "The Carnegie Corporation would supply \$7500 for the purchase of approximately one hundred and fifty films for the State Library. * * *

"* * * The one hundred and fifty films purchased by the Corporation would go to start a reservoir film collection in the State Library which could be loaned individually at any time by any library in the state.

"The second year the Corporation would buy one hundred new films, the members put up another \$250 and receive fifteen new films each two months. The third year the Corporation would buy only fifty films, which, with those purchased with member contributions, would permit the films to be circulating on the circuit. * * * "

(Underscoring ours.)

The underscored portions of the proposal disclose that the Carnegie Corporation purchases the films. It would appear from the conditions of the grant that the money was given to the State Library as trustees for the Carnegie Corporation with the power and authority to purchase films for the Corporation and after the films were purchased to turn them over to the state as its property. This intent has been verified in a conference with a representative of the Carnegie Corporation. Under the conditions of the grant, no money was ever received by the state, and, therefore, it was not state money within the meaning of the constitutional provision.

CONCLUSION

It is, therefore, the opinion of this department that money appropriated by the Carnegie Corporation to the Missouri State Library for the support of a demonstration of film distribution and use, is not "money received by the state" within the meaning of Section 36, Article III of the Constitution of Missouri, 1945, so as to require such money to be deposited in the state treasury and be appropriated out by law, but rather, such money was appropriated to the State Library as trustees for the Carnegie Corporation for the purpose of purchasing films for the Corporation, which films when purchased were to become the property of the State of Missouri.

Respectfully submitted,

ARTHUR M. O'KEEFE Assistant Attorney General

APPROVED:

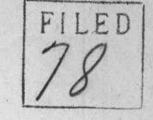
J. E. TAYLOR Attorney General PENITENTIARY :

Employees of State Penitentiary paid in accordance with State Merit System Act.

MERIT SYSTEM :

Copytustor Jurius.

February 26, 1949



Honorable J. E. Sanders Representative of Madison County Missouri House of Representatives Jefferson City, Missouri

Dear Sir:

This department is in receipt of your request for an official opinion which reads as follows:

"Does the provision in the Revised Statutes of Missouri, 1939, Section 9039, which provides that 'All turn-keys and guards shall receive for their services the sum of one hundred thirty-five dollars per month * * * 'limit the amount of compensation the guards may receive under the State Merit System, Laws of Missouri, 1945, pages 1157 to 1182 to \$135.00 per month?"

2.28

Section 9039, R.S. Mo. 1939, provides for the appointment of turnkeys and guards for the State Penitentiary, and further provides that:

"* * *All turnkeys and guards shall receive for their services the sum of one hundred thirty-five dollars per month * * * ."

The salary mentioned in the above quoted statute was fixed by the Legislature in 1927 (Laws of Missouri, 1927, page 128). The Constitution of Missouri, 1945, included for the first time in a Constitution of this State a provision for a merit system for certain state departments and divisions. Section 19, Article IV of the Constitution provides, in part, as follows:

"* * All employees in the state eleemosynary and penal institutions, and other state employees as provided by law, shall be selected on the basis of merit, ascertained as nearly as practicable by competitive examinations; * * * ."

The 63rd General Assembly in 1945, in carrying out the mandate of the Constitution, enacted what is known as the State Merit System Act, Laws of Missouri, 1945, page 1157. This act applies to all offices, positions and employees of the State Department of Corrections of which the State Penitentiary is a part. The act contains forty-seven sections and sets up a complete "system of personnel administration" which "shall govern the appointments, promotions, transfers, lay-offs, removal, and discipline of certain employees and other incidents of state employment." (Section 2, Laws of Missouri, 1945, page 1158). The act further provides that certain executive offices and positions are hereby exempted from the operation of this act and may be filled without regard to those provisions hereof which relate to the selection, appointment, pay, tenure and removal of persons employed in such agencies:" (underscoring ours.)

Sub-section (8) of Section 2 of the law provides as follows:

"All positions and appointments in divisions of the service subject to this act which have been heretofore required to be filled upon the basis of merit and fitness; provided, however, that one year after this act becomes effective this exemption shall cease and determine and thereafter the selection, appointment, pay, tenure and removal of persons to or from all such positions shall be governed by the provisions of this act; * * *."

(Underscoring ours.)

A reading of the above quotation from Section 2 of the State Merit System Act discloses that it was the

intent and purpose of the Legislature that the pay of all persons covered by the law would be determined and fixed according to the provisions of the law.

Section 15 of the act sets up the pay plan for the officers and employees and provides as follows:

"After consultation with appointing authorities and the State fiscal officers, and after a public hearing, the Director shall prepare and recomment to the Board a pay plan for all classes subject to this act. Such pay plan shall include for each class of positions, a minimum and a maximum rate, and such intermediate rates as the Director considers necessary or equitable. In establishing such rates, the Director shall give consideration to the experience in recruiting for positions in the State service, the rates of pay prevailing in the locality for the services performed, and for comparable services in public and private employment, living costs, maintenance, or other benefits received by employees, and the financial condition and policies of the State. Such pay plan shall take effect when approved by the Board and each employee appointed to a position subject hereto after the adoption of the pay plan shall be paid at one of the rates set forth in the pay plan for the class of positions in which he is employed. The pay plan shall also be used as the basis for preparing budget estimates for submission to the legislature in so far as such budget estimates concern payment for services performed in positions subject hereto. Amendments to the pay plan may be recommended by the Director from time to

time as circumstances require and such amendments shall take effect when approved by the Board. The conditions under which employees may be appointed at a rate above the minimum provided for the class, or advance from one rate to another within the rates applicable to their positions, shall be determined by the regulations."

It is a rule of statutory construction that where a later act covers the whole subject of earlier acts, embraces new provisions, and plainly shows that it was intended, not only as a substitute for the earlier acts, but to cover the whole subject then considered by the legislature, and to prescribe the only rules in respect thereto, it operates as a repeal of all former statutes relating to such subject matter. (59 C.J. 919; Meriwether vs. Love, 167 Mo. 514, 67 S.W. 250.)

Applying the above stated rule to the statutes in question we believe it is apparent that the General Assembly in enacting the State Merit System Act intended to cover the whole subject of pay and, therefore, repealed by implication all previous statutes which provide the amount of salary to be paid officers and employees of the departments included under the State Merit System Act.

CONCLUSION

It is, therefore, the opinion of this department that Section 9039, R.S. Mo. 1939, which sets the salary of the turnkeys and guards at the State Penitentiary at one hundred thirty-five dollars per month has been repealed by the State Merit System Act, Laws of Missouri, 1945, page 1157, and turnkeys and guards must be paid in accordance with the provisions of said State Merit System Act.

Respectfully submitted,

APPROVED:

ARTHUR M. O'KEEFE Assistant Attorney General

J. E. TAYLOR Attorney General

AMO'K:ir

TAXATION

Property of Christian College is not rendered liable to taxation by reason of the ownership and maintenance of . dormitories and cafeterias for students. Such property should not be assessed by assessor, but if assessed, county court may correct assessment and remit taxes levied against property.

December 28, 1949

Honorable Carl F. Sapp Prosecuting Attorney Boone County Columbia, Missouri

Dear Sir:

We have received your request for an opinion of this department, which request is as follows:

> "I have been asked, by the County Court, to determine what right the County has to remit taxes once they are assessed.

"Christian College, of this City, is an educational institution, and as far as I know, does not have any property used for investment purposes incidental to the running of the school. However, they maintain dormitories which are used for the housing of the girls attending the school; and they maintain dining rooms for the purpose of feeding the students. I believe that these dormitories and cafeterias are run on a non-profit basis.

"For many years the assessor of Boone County has been assessing Christian College property and setting a tax thereon. However, the County Court has made it a practice to remit the taxes before they are collected. Section 5 of the 1945 Session Laws, page 1799 provides; 'The following subject shall be exempt from taxation for state, county or local purposes: * * * *

"'Sixth, all property, real and personal actually and regularly used exclusively for religious worship, for schools and colleges. or for purposes purely charitable, and not held for private or corporate profit

shall be exempted from taxation for state, city, county, school, and local purposes; provided, however, that the exemption herein granted shall not include real property not actually used or occupied for the purpose of the organization but held or used as investment even though the income or rentals received therefrom be used wholly for religious, educational, or charitable purposes.

"It seems to me that under the above section, the assessor should not even assess the Christian College property unless the dormitories be considered investment property.

"I can find no authority for the assessment of the Christian College property; and I can find no authority for the county to remit the taxes if the property is assessed. At no place in the statutes pertaining to powers of the County Court do I find this power remittance set out.

"Will you please give me an opinion as to whether or not the Boone County Assessor may lawfully assess the property belonging to an educational institution where the school maintains dormitories and cafeterias operating on a non-profit basis, and on the power or authority of a county to remit taxes once they have been assessed."

1. Exemption of Property from Taxation.

The statutory provision quoted in your request was enacted pursuant to the provisions of section 6 of article 10, Constitution of 1945, which section reads in part as follows: "* * * all property, real and personal, not held for private or corporate profit and used exclusively for * * * schools and colleges * * * may be exempted from taxation by general law." (In your letter you do not expressly state that Christian College is not operated for private or corporate profit. Presumably it is a non-profit corporation.)

We find no cases in which the exact question presented by you has been passed upon by the courts of this state. In the case of State ex rel. Spiller v. Johnston, 214 Mo. 656, 113 S.W. 1083, the court held that a building used as a private military boarding school was not deprived of its exemption from taxation as a building used exclusively for school purposes by reason of the fact that the proprietor and his family resided in the building. In the case of Y.W.C.A. v. Baumann, 344 Mo. 898, 130 S.W. (2d) 499, the operation of a cafeteria by the Y.W.C.A. was held not to cause the property in question to be deprived of its exemption because not used exclusively for charitable purposes.

Cases in other jurisdictions have considered directly the question of liability for taxation of college and university dormitories and dining halls under constitutional and statutory provisions similar to those found in this state. In the case of Yale University v. Town of New Haven, 71 Conn. 314, 42 A. 87, such property was held exempt. The statute there involved exempted "buildings or portions of buildings exclusively occupied as colleges, acadamies, churches or public school houses, or infirmaries." The court in its opinion stated (42 A. 1. c. 91) that the settled meaning of the term "college" is "a building or group of buildings in which scholars are housed, fed, instructed and governed under college discipline, while qualifying for their university degree, whether the university includes a number of colleges or a single college."

The court in the opinion further stated:

"It was impossible for the legislature to express its meaning more clearly than in the language of section 3820, 'buildings occupied as colleges.' If it had said 'dormitories, dining halls and other buildings occupied as colleges,' the meaning would have been the same, and the amplification would have added nothing to the precise certainty of the language used. * * *"

"The fact that certain sums are paid for use of the rooms occupied does not alter the character of the occupation. * * * And a college is none the less a college because its beneficiaries share the cost of maintenance; and it is immaterial whether such contribution is lumped in one sum, or apportioned to sources of expense, as tuition, room rent, lecture fee, dining hall, etc."

Honorable Carl F. Sapp

A similar result was reached in the cases of Harvard College v. Cambridge Assessors, 175 Mass. 145, 55 N.E. 844; City of Chicago v. University of Chicago, 228 Ill. 605, 81 N.E. 1138; People v. University of Illinois Foundation, 388 Ill. 363, 58 N.E. (2d) 33.

In view of the foregoing authorities, we feel that the use of the property for dormitories and dining halls for students does not cause the property to be used other than exclusively for college purposes, and therefore such property is exempt from taxation.

2. Duty of Assessor.

The duties of the county assessor are set out in an act found in Laws of Missouri, 1945, p. 1782 (Sec. 11000.1 et seq., Mo. R.S.A.). Section 4 of the act requires the assessor to take an oath that he will "assess all of the real and tangible personal property in the county in which he assesses." However, other sections indicate, and such would certainly seem to be the proper procedure, that the assessor is obliged to assess only the taxable property located in his county.

Section 10 provides in part as follows: "He (the assessor) shall * * * require such persons to make a correct statement of all taxable real and tangible personal property * * * ." Section 14 requires the assessor to make a list of taxable property, when no list is returned to him. The affidavit required of the owner by section 17 refers to property "made taxable by the laws of the State of Missouri."

Thus, where property is clearly exempt from taxation, the assessor is not required to assess such property. Such action is clearly superfluous.

3. Authority of County Court.

"It has been held uniformly that county courts are not the general agents of the counties or of the state. Their powers are limited and defined by law. They have only such authority as is expressly granted them by statute." King v. Maries County, 297 Mo. 488, 249 S.W. 418, 1. c. 420.

Section 24 of Laws of Missouri, 1945, p. 1782, provides in part as follows:

"The county court of each county may hear and determine allegations of erroneous assessment,

or mistakes or defects in description of lands, at any term of said court before the taxes shall be paid, on application of any person or persons who shall, by affidavit, show good cause for not having attended the county board of equalization or court of appeals for the purpose of correcting such errors or defects or mistakes. * * *

Section 24 of said act provides:

"The clerk of the county court shall immediately correct the tax book, and the copy thereof furnished for the use of the collector, under any order which may be made by said court in pursuance of the foregoing section; and if, by such correction, any alteration is made in the value of the property or the amount of taxes, he shall certify the same to the state auditor, who shall, on the settlement, allow the collector credit for any sum or sums to which such corrections may entitle him."

Assessment of exempt property would appear to be an "erroneous assessment" within the meaning of the above sections. Section 24 clearly contemplates remittance of tax liability in some instances.

Further authority of the county court to remit taxes on exempt property may be found in section 11114, R. S. Mo. 1939, re-enacted, Laws of Mo., 1945, p. 1910. That section requires the county court to examine delinquent tax lists certified to it, and provides that "if any of said lands, or town lots are not subject to taxation, * * * the said court shall correct such error by the best means in their power * * *."

CONCLUSION

Therefore, this department is of the opinion that property owned by Christian College is not deprived of its tax exempt status by reason of the ownership and operation by the college of dormitories and dining halls for students at said college; that the property of said college should not be assessed by the Boone County Assessor; and that should such property be assessed, the county court, upon proper application, may remit any taxes, levied and unpaid, upon

Honorable Carl F. Sapp

such property.

Respectfully submitted,

APPROVED:

ROBERT R. WELBORN Assistant Attorney General

J. E. TAYLOR Attorney General

RRW/feh

CRIMINAL LAW: PROBATE COURTS PROHIBITION: Section 4191, R.S. Mo. 1939, discloses exclusive procedural steps to be taken where a defendant has been charged, tried, convicted and sentenced and his insanity is suggested. Probate court is nwithout authority to entertain insanity he aring in such cases. Prohibition will hier to restrain the probate court from exercising such jurisdiction.

March 16, 1949

3-17

FILED

Honorable Louis H. Schult Judge 38th Judicial District Caruthersville, Missouri

Dear Sir:

The department acknowledges receipt of your recent request for an opinion, which request reads as follows:

"In February of this year I tried a criminal case herein the defendant was charged with felonious assault. Defendant admitted the assault but plead permanent insanity. Defendant was found guilty and sentenced to five years in the penitentiary, thus in effect finding him sane. Defendant has appealed.

"Since then, application filed and hearing had in the Probate Court as to defendant's sanity; the Probate Judge having announced he will find defendant insane, the State, by writ of prohibition is trying to prevent the Probate Judge from passing on same.

"Defendant's counsel contends that under Section 9328 (re-enacted Laws 1945, P.1) the Probate Court has jurisdiction while the State contends that since this is a proceeding to have a party declared insane after conviction, that Section 4191 controls and it is a matter for the Governor to pass on; that the defendant should apply to the Governor for a hearing and not to the Probate Court.

"And, if the Probate Court has jurisdiction, could that court commit him to State Hospital No. 1, for the criminal insane rather than to State Hospital 4, Farming.ton. "I am wondering whether this question has ever been presented to you, and if not, will you kindly give me your opinion as to whether Section 9328 or Section 4191 controls?"

The inquiry may be disposed of by ascertaining whether or not the Probate Court, under the circumstances outlined above, has jurisdiction to entertain the insanity proceeding. If no jurisdiction exists, prohibition will necessarily lie to prevent the Probate Court from entering its decree.

Before applying Section 4191, R.S. Mo. 1939, of the Missouri criminal code, to the case at hand, reference is made to an opinion of the Supreme Court of Arkansas in the case of Ferguson v. Martineau, 171 S.W. 472, 115 Ark. 317. There the Court was called upon to determine the right of the Probate Judge of Pulaski County, Arkansas to entertain an insanity hearing on a defendant who had been convicted and sentenced to be executed for a criminal offense. The Probate Court in that instance proceeded under a statute which provides as follows:

"If any person shall give information in writing to such court that any person in his county is an idiot, lunatic or of unsound mind, and pray that an inquiry thereof be had, the court, if satisfied that there is good cause for the exercise of its jurisdiction, should cause the person so charged to be brought before such court, and inquire into the facts by a jury, if the facts be doubtful."

The Supreme Court of Arkansas ruled in the above cited case that the probate court had no power to enter upon an inquiry as to the sanity of a person held under sentence of death, nor could a court of chancery issue an injunction restraining the execution of such sentence until after the probate hearing. In discussing the purpose of the statute quoted above the Court said:

"This section was enacted solely for the purpose of protecting the civil and property rights of insane persons, as is clearly shown by the section itself and the other sections of the same chapter.

It has no reference whatever to determining the issue of the sanity of one who has been convicted and sentenced to be executed for a criminal offense, and who is already in custody of the law for that purpose."

Section 4191, R.S. Mo. 1939, has special application to the case at hand. This section is contained in Article 18, of Chapter 30, R.S. Mo. 1939, which article deals with "pardon, suspension of sentence, remittance of fine and parole of prisoners." Section 4191, supra, has appeared in former revisions of our statutes since Laws of 1881, with minor changes having taken place in its wording, which changes do not cause the present statute to differ from the 1889 revision which disclosed that power of inquiry, authorized therein, was vested in the Governor of the State. Section 4191, R.S. Mo. 1939, reads as follows:

"If any person, after having been convicted of any crime or misdemeanor, become insane before the execution or expiration of the sentence of the court, it shall be the duty of the governor of the state to in inquire into the facts, and he may pardon such lunatic, commute or suspend, for the time being, the execution of such sentence, and may, by his warrant to the sheriff of the proper county, or the warden of the penitentiary, order such lunatic to be con-veyed to the hospital for the care and treatment of the insane, and there kept until restored to reason. If the sentence of such lunatic is suspended by the governor, it shall be executed upon him after such period of suspension has expired; and the expense of conveying such lunatic to the hospital for the care and treatment of the insane shall be audited and paid out of the fund appropriated for the payment of criminal costs, but the expenses at the hospital for the care and treatment of the

insane for his board and clothing shall be paid as now or hereafter provided by law in cases of the insane poor: Provided, if such person shall be adjudged to be insane and shall have property, the costs shall be paid out of his property, by his guardian. (R.S. 1929, 3801 Amended, Laws 1939, p.352.)"

Concerning the purpose of Section 4191, R.S. Mo. 1939, supra, the Supreme Court of Missouri, in the case of Schields v. Johnson County, 47 S.W. 107, 144 Mo. 76 l.c. 80, spoke as follows:

"By this statute express power and authority are conferred upon the Executive of the State to inquire into the facts; in such manner as he may think best, with respect to the insanity of convicts who become insane after their conviction, and before the expiration of their sentences, and by his warrant, directed to the warden of the penitentiary, to order such lunatic conveyed to the insane asylum, and there kept until restored to reason. There is no appeal from the conclusion which may be reached by the executive in such cases, and his warrant to the warden is conclusive with respect to such action. This power was conferred upon the Executive for the manifest purpose of avoiding the necessary inconvenience and expense of an attempt to remove convicts who become insane after their incerceration in the penitentiary to the county or place where convicted for the purpose of having them declared insane by a jury of the county where committed."

Assuming for the purpose of argument, that Section 4191 and Section 9328, R.S. Mo. 1939, relate to the same subject, insanity inquiries, such laws must be read together and the pro-

visions of the one having a special application to a particular subject will be deemed to be a qualification of, or an exception to the other act general in its terms (Eagleton v. Murphy, 156 S.W. (2nd) 683, 348 Mo: 949).

The case of State v. Brockington, 162 S. W. (2nd) 860, 349, Mo 662, discloses the attitude of the Supreme Court relative to the special application to be made of Sections 4190-4195, R.S. Mo. 1939, which statutes disclose a mode of procedure to be followed in the class of cases with which we are dealing. In the Brockington case a judgment of the trial court imposed the death sentence on defendant. Pending the defendant's appeal the Governor advised the Sheriff of Jackson County of the receipt of information casting doubt on the then sanity of defendant. The sheriff then instituted proceedings to inquire into defendant's sanity under the provisions of Section 4192 R.S. Mo. 1939, which proceedings resulted in finding the defendant insane. Acting upon said finding, the Governor of Missouri, suspended the execution of the death sentence against defendant for the reason that he had been declared insane and committed him to the State Hospital for the Insane, No. 2, at St. Joseph, Missouri. Later the State Hospital released defendant without giving due notice to the Governor. The Court held that defendant had never been discharged from the State Hospital No. 2, within the meaning of our statutory provisions relating to confinement and treatment of convicts becoming insane pending the execution of a judgment assessing their punishment. The Court further declared:

and letter of said statutory provisions (Sec. 4190-4195) to hold that the officers of such institutions, vested with authority to discharge persons committed thereto because of insanity, may blandly discharge therefrom convicts whose sentences, stand unexecuted by reason of their insanity without affording due opportunity to other law enforcement officers of the State to carry into execution the judgments of our courts having criminal jurisdiction, thus tending to hinder the administration of the criminal laws in such instances. The statutes contemplate as did the warrant of the Governor

No. 2; that those responsible for the receipt and restraint of Brockington at said Institution would give due notice of his restoration to reason to the Governor and otherwise comply with the laws and orders of the duly constituted State officials and tribunals to the end that the judgment and sentence of the court, temporarily suspended during Brockington's insanity, he carried into execution in accord with due process of law."

The Brockington case differs from the instant case in that in the former a death sentence was adjudged, whereas in our case a five years sentence was adjudged. In the Brockington case the sheriff instituted the proceedings under authority expressly given in Sections 4192-4194, inclusive, R.S. Mo. 1939. The result of that inquiry was then used as the basis for the Governor's action under Section 4191, R.S. Mo. 1939. This last mentioned section directs that the Governor "inquire into the facts" but does not direct that an insanity proceeding be instituted as in cases where the death sentence has been imposed.

At 14 American Jurisprudence, 1.c. 804, the following is found relative to the effect of insanity after conviction:

"A person who was some at the time he committed an offense and at the time of trial and sentence, but claims to have become insane during his confinement awaiting execution of his sentence, does not have an absolute right to a trial to determine his present mental condition unless it is expressly conferred by statute. An inquisition upon the defendant's present condition rests in the sound discretion of the court. It is generally recognized that to permit convicted persons to arrest the execution of the sentence imposed upon them by demanding as a legal right an inquisition into their mental

condition would be tantamount to granting them the privilege of thwarting the
administration of criminal justice for
an indefinite term. Hence, persons in
confinement awaiting the execution of
the death penalty have no legal right,
except where such right is conferred by
statute, to have an incuisition into
their mental condition. The initiating
of such a proceeding is within the discretion of the court or the executive
having jurisdiction in such matters."
(Underscoring ours).

Discussions and citations made herein, supra, clearly indicate that the only recourse defedant has at this time is to follow the procedure disclosed in Section 4191, R.S. Mo. 1939, if he feels that his present condition makes him a fit subject for confinement in an institution for the insane. The circuit court on its own motion, if it so desires, has adequate authority to conduct its own inquisition in this matter, and by so doing, have facts available to present to the Governor for his action under Section 4191, R.S. Mo. 1939. The exercise of such jurisdiction by the Circuit court would merely be in aid of its general jurisdiction over this criminal case at a time when the defendant is still in the custody of the court.

Prohibition is a proper remedy for the State to invoke in this instance against the unwarranted usurpation and exercise of jurisdiction by the probate court. The probate court does not have legal custody of the defendant and it is difficult to see where it can accomplish its declared purpose in this instance. We have been unable to discover where the State has ever before sought to prohibit this untimely exercise of jurisdiction by a probate court. However, it must be conceded that prohibition may be invoked to restrain the enforcement of orders beyond or in excess of the legitimate authority of the judge though the court over which he presides has general jurisdiction of the class of cases to which the one in question belongs—cases involving insanity inquiries. (State ex rel. Schoenfelder v. Owen, 152 S.W. (2nd) 60,347 Mo. 1131).

From what has been said regarding the lack of jurisdiction of the Probate Court to enter a judgment in the insanity inquiry

which has been instituted in such court, it is useless to discuss the question of where the probate court would commit the subject.

CONCLUSION

Where a defendant has been charged, tried, convicted and sentenced to a term in the penitentiary and the execution of such sentence is stayed pending appeal, the probate court is without jurisdiction to entertain an insanity inquiry and adjudge such defendant an insane poor person and order his committment to a State hospital. Procedural steps outlined in Section 4191, R.S. Mo. 1939, are controlling in such case, and prohibition is a proper remedy to be invoked by the State to restrain the Probate Court from exercising such jurisdiction.

Respectfully submitted,

JULIAN L. O'MALLEY Assistant Attorney General

APPROVED:

J. E. TAYLOR Attorney General

JLO'M:p

SCHOOLS:

Taxpayers who pay school taxes voluntarily is not entitled to a refund even though tax is illegal.

February 28, 1949

Mr. Samuel E. Semple Prosecuting Attorney Moberly, Missouri

Dear Sir:



This will acknowledge receipt of your letter of January 12, 1949, in which you request an opinion of this department. This opinion request, omitting caption and signatures is as follows:

"I would like to obtain an Opinion from your office concerning a refund on school taxes. We have two cases of tax-payers who have paid school taxes in one school district when they live and their property is actually in another school district. I would like to know whether the tax-payer can get a refund on these taxes, and if he is entitled to such a refund, what body would make an order authorizing their refund."

For the purposes of this opinion we must assume that the payment of the school taxes aforesaid was a voluntary payment by the tax payer. Such being the case it would appear to be a general rule in this state that any money voluntarily paid to the district as a tax cannot be recovered back by the taxpayer because the tax is void and irregular. In State ex rel Kresge vs. Howard, 208 SW(2) 247, (Mo. Sup.) 1 c 250, the court said:

"It is generally held that taxes voluntarily paid without compulsion although levied under an unconstitutional statute, cannot be refunded without the aid of a statutory remedy. 51 Am. Jur. Taxation Sec. 1167."

Any school taxes assessed against the taxpayer, as in your case, by the wrong school district would be, of course, a void and irregular tax, but if the payments of such taxes were voluntarily made the courts of this state seem to hold that such payment cannot be recovered. See Christys Adm'r vs. City of St. Louis, 24 Mo. 443 61 AM. DEC 498; St. ex rel Rice vs. Powell, 44 Mo. 436; Kansas City ex rel Elliott vs. Holmes 106 SW 559, 127 Mo. App. 620.

Again in 56 C.J. 714 Section 823, we find the following statement:

Mr. Samuel E. Semple

"In accordance with general rules elsewhere considered in this work and as statutes
in some jurisdiction provide, an action at law
may be maintained to recover illegal taxes
paid involuntarily or where the district does
not legally exist when paid under protest; but
where a tax has been paid voluntarily and not
under duress or coercion it cannot be recovered,
even though paid under protest, although the
tax was illegal, * * *."

In the case of State ex rel SS Kresge vs. Howard, supra, (Mo.) the Supreme Court of this state discussed this matter with reference to whether a payment of taxes, even though made without protest, is voluntary or involuntary. In that case, the Court held that since the relator (taxpayer) was faced with the forfeiture of his right to continue business in the State of Missouri and with out penalties unless the tax was paid, such payment was then involuntarily made and thus relator could recover back the tax paid. However, in that case the State of Missouri through the Legislature, had alreadly appropriated enough money to pay the tax, thus acknowledging its liability.

We feel that the Kresge case, cited above is distinguishable from the instant cases. In that case they were faced with the proposition that unless they paid the domestication tax, they could no longer do business in this state, and the court held that a payment of the tax in such emergency constituted an involuntary payment. If the facts in this case were that the school tax payments in question were made under the same compulsion that existed in the Kresge case, then the payments in the instant case would probably be deemed involuntary and a refund then would be governed by the ruling in the Kresge case. However, in the instant case apparently no such emergency existed and no doubt the tax payments were made in the usual course of events. Under such circumstances we feel that such payment was a voluntary payment.

Therefore, following the general rule as set out above, in view of the fact that this was a voluntary payment, this department does not feel that the persons making the school tax payments mentioned in your letter would be entitled to a refund for such payments.

CONCLUSION

Therefore, it is the opinion of this department that persons who pay school taxes in a district other than the district in which

Mr. Samuel E. Semple

their land lies and where they live, cannot recover and are not entitled to a refund for such taxes voluntarily paid.

Respectfully submitted,

John S. Phillips Assistant Attorney General

APPROVED:

Attorney General

COUNTY BUDGET:
SCHOOLS (ANNUAL
DISTRIBUTION):

Discretionary with county court to call special election to distribute annually capital of liquidated school fund. Election may be called even though not budgeted.

March 10, 1949

3-14



Hon. W. D. Settle Prosecuting Attorney Howard County Fayette, Missouri

Dear Sir:

This is in reply to your request for an opinion from this department, which reads as follows:

"1. The budget for 1949 has been approved and no provision is made for a special election. Must this proposition be submitted at a special election or can the County Court order the proposition submitted at the general election to be held in November, 1950?

"2. In the event a special election is called, may it be held in conjunction with the annual school election? If so, does the County Court or the school boards elect the judges and clerks?"

Your request involves several questions and we will take them up in order.

1. Must this proposition be submitted at a special election or can the county court order the proposition submitted at the next general election?

In a previous opinion rendered by this office concerning Section 10376, Mo. R. S. A. (Melton - 1947), our conclusion was as follows:

"It is further the opinion of this department that upon petition of the voters of any county or the City of St. Louis as provided by Section 10376.1, Mo. R.S.A., it is mandatory that the county court call a special election as provided by Section 10376.2, Mo. R.S.A., even though funds have not been set aside in the county budget for this purpose."

At the time the above-mentioned opinion was written the law then in effect read as follows (Laws of Missouri, 1945, pages 876, 877):

"Said proposal shall be submitted at a special election to be held for that purpose within sixty days after the filing of the petition therefor * * *"

The 64th General Assembly, by an act which became effective June 3, 1947, amended this section as follows (Laws of Missouri, 1947, Volume I, page 285):

"Said proposal shall be submitted at a special election to be held for that purpose within sixty days after the filing of the petition therefor or at the next general election held in such county.

* * *" (Underscoring ours.)

Another change made by the amendment in 1947 consisted of a grant of authority to the county courts to consolidate election districts or precincts in their respective counties in relation to an election upon the proposal to distribute annually the capital of the liquidated school funds. Under the law as it formerly read it was mandatory that the county court hold a special election and submit the above proposition to the voters. This special election had to be held within sixty days of the filing of the petition therefor. By the 1947 amendment the Legislature added the underlined words, supra. It is a rule of statutory construction that an amendatory statute should be construed on the theory that the Legislature intended something by the amendment (Holt v. Rea, 52 S.W. (2d) 877, 330 Mo. 1237). We believe that the Legislature intended to remove the mandatory feature which prevailed in the law as written in 1945 and substitute therefor the above provision which would give the county court discretion as to submission of the proposal at a special election or at the next general election held in such county.

2. When is the next general election?

It would seem that, with nothing further, the term "general election" would be construed to mean that which is set out in

Section 655, R. S. Mo. 1939, to wit:

" * * * the term 'general election' refers to the election required to be held on the Tuesday succeeding the first Monday of November, biennially; * * *"

However, the Supreme Court of Missouri, en banc, in the case of Dysart v. City of St. Louis, 11 S.W. (2d) 1045, considered a case wherein it discussed the terminology of, and differences between, special elections and general elections. At 1.c. 1052 the court said:

"It necessarily means that a special election is one called for a special purpose, not one fixed by law to occur at regular intervals. * * * Therefore it avails nothing to distinguish a primary election from the statutory definition of any other general election."

It seems that the holding of the court in respect to the term "general election" is that it is one which takes place by law at stated times. Therefore, we believe that the court holding in the Dysart case indicates that the "next general election" will be the primary election in 1950.

The school election which will be held on April 5, 1949, will not be a general election because the residents of the county will not be voting as a county unit. Some of the voters will be assembling at the annual meeting as provided for in Section 10418, R. S. Mo. 1939, while others will be expressing their opinions in the manner provided for by Section 10483, R. S. Mo. 1939.

3. May the expense incurred in holding a special election be allowed even though the 1949 budget makes no provision therefor?

In your request you state that the budget for 1949 has been approved and no provision is made for a special election. We understand by this that Section 10914, R. S. Mo. 1939, providing for estimated expenditures and classes, has been complied with, that is, that the estimate for this class is not less than the last preceding odd year, which is 1947.

In our former opinion (Melton - 1947) we concluded that the rule as set out in the case of Gill v. Buchanan County, 142 S.W.

(2d) 665, was applicable in the instance. In that case the court said, 1.c. 668, 669:

"Defendant also contends that plaintiff is not entitled to recover because there was not a sufficient amount provided in the 1934 county budget for county court salaries to pay salaries of \$4,500 each. (Only \$840 more than the total of salaries figured at \$3,000 each was included in the salary fund for the county court.) However, as hereinabove noted, salaries of county judges are fixed by the Legislature and the Constitution prevents even the Legislature from changing them during the terms for which they were elected. Surely, the county court cannot change them, by either inadvertently or intentionally providing greater or less amounts in the salary fund in the budget. The action of the Legislature in fixing salaries of county officers is in effect a direction to the county court to include the necessary amounts in the budget. Such statutes are not in conflict with the County Budget Law but must be read and considered with it in construing it. They amount to a mandate to the County Court to budget such amounts. Surely no mere failure to recognize in the budget this annual obligation of the county to pay such salaries could set aside this legislative mandate and prevent the creation of this obligation imposed by proper authority. Certainly such obligations imposed by the Legislature were intended to have priority over other items as to which the county court had discretion to determine whether or not obligations concerning them should be incurred. They must be considered to be in the budget every year because the Legislature has put them in and only the Legislature can take them out or take out any part of these amounts. This court has held that the purpose of the County Budget Law was 'to compel . * * * county courts to comply with the constitutional provision, section 12, art. 10' by providing 'ways and means for a county to record the obligations incurred and thereby

enable it to keep the expenditures within the income. Traub v. Buchanan County, 341 Mo. 727, 108 S.W. 2d 340, 342.

"To properly accomplish that purpose, mandatory obligations imposed by the Legislature and other essential charges should be first budgeted, and then any balance may be appropriated for other purposes as to which there is discretionary power. Failure to budget funds for the full amount of salaries due officers of the county, under the applicable law, which the county court must obey, cannot bar the right to be paid the balance. Instead, it must be the discretionary obligations incurred for other purposes which are invalid, rather than the mandatory obligation imposed by the same authority which imposed the budget requirements. We, therefore, hold that a county court's failure to budget the proper amounts necessary to pay in full all county officers' salaries fixed by the Legislature, does not affect the county's obligation to pay them."

We believe that even though the county court has not budgeted funds for the expenses necessarily incurred in the holding of a special election that, if the county court in its discretion determines to submit the issue to the voters at a special election, such sums must necessarily be made available for this purpose. If such were not the law, an adsurd situation could develop with regard to a carrying out of the provisions of the Legislature in connection with the distribution of the liquidated school fund. Suppose, for an example, a petition was submitted to the county court on March 1, 1950, after the budget for 1950 had been approved, without provisions having been made for the payment of expenses curtailed in such election. If the county court decided to submit the issue at a special election within sixty days there would be certain expenses involved; likewise if the county court decided to submit the issue at the next general election there would also be expense involved. even though not as great. To say that funds would not be available for the submission of the issue to the voters would be going contrary to the rule laid down by the Supreme Court in the Gill v. Buchanan County case, supra. As was said in the case of State v. Smith, 182 S.W. (2d) 571, at 1.c. 574:

" * * * All of these acts, the Budget Act, the Purchasing Agent Act and the County Budget Act, were passed at the same session in 1933. Their primary purpose was to regulate the usual operation of the regular departments of Government whose needs could be foreseen and planned on a biennial basis. * * * "

If a sum sufficient to conduct such special election was not set aside in classification two of the county budget, which is to include expenditures for elections, these expenditures must be made out of funds presently in classes five and six.

4. In the event a special election is called, may it be held in conjunction with the annual school election?

We believe that the answer to this question is to be found in the first sentence of the section providing for the submission of the issue under discussion. Said first sentence reads as follows (Laws of Missouri, 1947, Volume I, page 285):

"Said proposal shall be submitted at a special election to be held for that purpose within sixty days after the filing of the petition therefor or at the next general election held in such county.

* * *" (Underscoring ours.)

It has come to our attention that the petition was filed on February 1, 1949, and counting sixty days from that date, we find that the election must be held on or before April 2, 1949. The school election will not be held until April 5, 1949, therefore the special election may not be held in conjunction with the annual school election.

Conclusion.

Therefore, it is the opinion of this department that it is discretionary with the county court to call a special election upon the proposition to distribute annually the capital of the liquidated school fund or to submit said issue at the next general election held in the county. Speaking as of this date, the next general election will be the primary election

to be held in August, 1950. The county court may call the special election even though funds have not been set aside in the county budget for that purpose.

Respectfully submitted,

JOHN R. BATY Assistant Attorney General

APPROVED:

J. E. TAYLOR Attorney General

JRB:ml

JUVENILES:

Who is responsible for medical and surgical needs of juveniles on replacement from the Training Schools. Four questions.

March 16, 1949

Hon. W. E. Sears, Director Board of Training Schools State of Missouri Jefferson City, Missouri



Dear Mr. Sears:

Your letter of recent date requesting an opinion of this department as to the liability and responsibility to juveniles placed on parole contains four questions which are as follows:

- 1) Who is liable in the event of an injury or fatality occurring to a boy or girl who has been released from one of the training schools?
- 2) Who would be responsible for costs of surgery or medical care for a boy or girl under placement procedure and prior to the expiration of their term?
- 3) Should medical attention or surgery be determined necessary for a boy or girl, in one of the training schools or away from the training school on placement, must approval of the parents or guardian be secured prior to medical action or surgery?
- 4) In the event the parents consent is not necessary may the training school board authorize the needed service?

In reference to the first question set out in your letter wherein you ask, "Who is liable?" We Believe that you mean who would be responsible for costs and expenses in the event of an injury or fatality to a boy or girl who had been released from one of the training schools, rather than who would be liable in the event of an injury or fatality occurring to a boy or girl who had been released from one of the training schools.

Each of the above questions has reference to the care, liability and responsibility to a juvenile placed in the custody of the

Board of Training Schools of the State of Missouri, or in the custody of what is referred to, as a replacement home.

Section 34A, Laws of Missouri 1945, page 734 reads as follows:

"The board of training schools is hereby authorized to release on parole juveniles committed to institutions under its control; to impose conditions upon which such paroles are granted; to revoke and terminate such parole; and to discharge from legal custody. Release on parole shall be in accordance with rules and regulations made a matter of record by said board. Said board is hereby authorized to call upon the state board of probation and parole for pre-parole investigations and for supervision of and assistance to juveniles after their release from training schools. Said board of probation and parole is hereby authorized and it shall be their duty to furnish when requested reasonable services of the character herein indicated."

This section provides that the Board of Training Schools may release on parole juveniles committed to the institutions under its control in accordance with the rules and regulations made a matter of record by said board.

Section 9005, Laws of Missouri 1947, Vol. 2, page 323, 324 provides as follows:

In the case of New York Foundling Hospital v. Gatti, 203 U. S. 429 in dealing with what is to the best interest of the child, says:

"* * * * The State acts upon the assumption that its authority as parens patriae super-

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sedes all authority conferred by birth. People v. Chegary, 18 Wend. 637, 642; People v. Mercein, 8 Paige Ch., 47, 69."

This indicates that the State has a greater right to the care and custody of a child under its jurisdiction than that of a parent.

Spencer on the law of Domestic Relations, Section 627, page 548 says:

"* * * Beyond this, public and private beneficence has established in most states special institutions and agencies for the care of abandoned, neglected, delinquent and incorrigible youths of both sexes, and commitment to these institutions or to the care or supervision of these agencies may not only follow a conviction of crime in lieu of commitment to a technically penal institution, but may be had in cases where the child, though convicted of no specific offense, is in need of the special guardianship, discipline and protection that these institutions and agencies afford."

Section 9694, R. S. Mo. 1939 provides:

"This article shall be liberally construed to the end that its purpose may be carried out, to-wit, that the care, custody and discipline of the child shall approximate as nearly as may that which should be given by its parents; and that as far as practicable any delinquent child shall be treated, not as a criminal, but as misdirected and misguided and needing aid, encouragement, help and assistance."

In American Jurisprudence, Vol. 39, Section 61, page 698, it is said:

"* * * * School teachers, at least for purposes of discipline stand in loco parentis, as also do college authorities."

Vol. 46, Corpus Juris, Section 174, page 1334 reads as follows:

"A person standing in loco parentis to a child is one who has put himself in the situation of a lawful parent by assuming the obligations incident to the parental relation, without

going through the formalities necessary to a legal adoption, and the rights, duties, and liabilities of such person are the same as those of the lawful parent. The assumption of the relation is a question of intention, which may be shown by the acts and declarations or the person alleged to stand in that relation. (Underscoring ours)

"A charitable institution having statutory power to receive deserted children stands to them in loco parentis."

Section 175, page 1335 reads as follows:

"A person standing in loco parentis is entitled to the custody of the child, as against third persons, unless his conduct renders him unfit for such custody, and necessarily acquires such power of control over the person of the child as is incident to the family government.

"A person standing in loco parentis to a minor child has the right to fix or change the child's domicile.

"The rule that a parent cannot irrevocably divest himself of the right of custody over his minor child by a contract or agreement to surrender it to another entends to one who stands in loco parentis. (Page 1336).

Section 176, page 1336 reads as follows:

"As in the care of natural parents, a person standing in loco parentis is bound for the maintenance, care, and education of the child, and liable for necessaries furnished to it, and he cannot, while such relation exists, be allowed to assert a claim for the support of the child to whom he stands in such relation, in the absence of an express or implied understanding

that he is to be compensated therefor. The poverty of the person standing in loco parentis may, however, rebut the presumption that the support was furnished gratuitously."

When a juvenile has been committed to the Board of Training Schools or to an institution under its control by a court of competent jurisdiction the law imposes upon said board and the institution certain responsibilities as provided for in Section 26, Laws of Missouri 1945, page 731, 732 which reads in part as follows:

"It shall be the duty of the board of training schools to administer and control all matters relating to the organization and functioning of the training schools of this state, and any branches and divisions thereof. The board shall provide for the reception, classification, care, activities, correction, education and rehabilitation of all juveniles committed by law to its charge or tn any institution under its control."

This duty continues so long as the juvenile is in the custody or under the control of said board and until this relationship is changed by operation of law.

Said duty and obligation on the part of the Board of Training Schools and the institution under its control creates a relation-ship of loco parentis of the Board of Training Schools to the junveile and the right of a person standing in the position in loco parentis to fix or change the domicile of a child is stated in Vol. 46, Corpus Juris 175, page 1335, heretofore quoted.

When a person accepts a child from the State Board of Training Schools or one of its institutions under its control for the purpose of taking him into their home and the relationship of parent and child are permitted to exist, the person so taking such child places himself in the position of loco parentis to the child.

The rule stated in Vol. 46 Corpus Juris, Section 174, page 1334, heretofore quoted was followed in the cases of Austin vs. Austin, 22 N. W. (2d) 560, 563; 147 Nebr. 100; and Meisner vs. U. S., 295 Fed. 866 (D. C. Mo.).

In the case of Capek v. Kropik, 21 N. E. 836, 837, 129 Ill. 509, the court said:

"* * * The husband is not bound to accept into his family the children of his wife by a former husband, but if he does so voluntarily, so long as the relation is permitted to continue he assumes the duties and obligations of a parent. So it is said, 'that a person in loco parentis means a person taking upon himself the duty of a father to make provision for the child."

Therefore, it would seem that where a person takes a child from any of the institutions under the control of the Board of Training schools into their home under circumstances mentioned above that he would place himself in the relationship of loco parentis to the child.

In the instances where a child is taken from the Board of Training Schools and placed under what they call "recognized job situation" but not necessarily kept in the home of a sponsor or employer, but the setup is such that the Board approves the same as being for the best interest of the child, creates the relationship of master and servant, and the liability and responsibility is somewhat different from that where the relationship of loco parentis exists.

In the case of Hunicke v. Meramec Quarry Co., 189 S. W. 1167, the court said that:

This liability, however, would exist and continue only during the hours which the juvenile is under the care and supervision of the employer, and during which time the law places the liability upon the employer. Before and after such hours the responsibility would be on the one standing in a position of loco parentis to the juvenile.

Since the state's right to a juvenile supersedes that of the natural parent; and since it is the duty of the trial court to act for the best interest of the child; and since the court retains

that authority until the child maintains its majority or until (in case of a definite term, then to the end of that term) the State Board of Training Schools and the home selected by it for replacement purposes, and the so-called recognized job situation selected and approved by the Board of Training Schools, the same purpose is their primary object, that is, what is to the best interest of the child. It would follow that the Board of Training Schools and the institutions under its control would be authorized to give permission for needed medical and surgical care, also the person or persons standing in the relation of loco parentis would have the right to consent to needed medical and surgical care as, also, would the master in the case of the relationship of master and servant in case of an emergency, if under all circumstances considered at the time and place, it is deemed to be for the best interest of the child.

CONCLUSION

It is the opinion of this department that:

- 1) The person or persons standing in the relationship of loco parentis to that of a boy or girl on replacement from the training school would be responsible for the costs and expenses in case of an injury or fatality.
- 2) The person standing in the relationship of loco parentis, and that in cases where the relationship of master and servant is created, the master, if the medical or surgical services are created out of the hazards or course of employment, would be responsible for the costs of such needed medical and surgical care.
- 3) Since the law creates the relationship of parent and child between the one standing in the position of loco parentis to the child it is our opinion that such person or persons could authorize such needed medical and surgical care as

circumstances necessitated, without the approval of the parent or guardian. Likewise in case of an emergency, we think the employer in cases where the relationship of master and servant had been created, could give such consent.

4) It is further the opinion of this department that the school authorities could authorize any needed medical or surgical services.

Respectfully submitted

GORDON P. WEIR Assistant Attorney General

APPROVED:

J. E. TAYLOR Attorney General

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GPW: A

BANKS-BRANCH BANKING:

by installing a pneumatic tube on a parking lot owned by the bank and across the
street from its banking house for the purpost of allowing customers of the bank to
place funds in said pneumatic tube to be
carried underneath the street and up into
the bank where such funds are deposited.

March 30, 1949

4-12

Honorable H. G. Shaffner Commissioner of the Division of Finance of the State of Missouri Jefferson City, Missouri

Dear Commissioner Shaffner:

This will acknowledge the receipt of your letter of recent date requesting an opinion from this Department, whether the Inter-State National Bank of Kansas City, Missouri, would be considered to be carrying on branch banking by installing a pneumatic tube on a parking lot owned by the bank and lying directly across Genesee Street in Kansas City, Missouri, from the banking house of the bank, said pneumatic tube to pass under Genesee Street and extend on up into the banking quarters of the bank, for the purpose and practice of permitting the bank's customers to drive upon said parking lot and deposit money, or the equivalent of money as deposits, in such pneumatic tube for passage through said tube into the bank. Your letter requesting the opinion of this Department on the question is as follows:

> "I am advised by letter that the Inter-State National Bank of Kansas City, Missouri, has their banking quarters at 1600 Genesee Street, Kansas City, Missouri; that it owns a parking lot directly across from the bank, where its customers can park in doing business with the bank.

> "As a convenience to its customers the bank desires to install a pneumatic tube on the parking lot, which tube will pass under Genesee Street and extend on up into the banking quarters. The bank's customers will then be able

matic tube for passage into the bank, without the necessity of having to park their cars and enter the bank.

"Kindly render a written opinion whether or not this practice could in any way be considered branch banking."

Section 7949, Mo. R.S.A. 1939, defines the powers of banks. The provise in paragraph 1 in said section states:

"Provided, however, that no bank shall maintain in this state a branch bank, or receive deposits or pay checks except in its own banking house."

The purpose of the bank named in your letter apparently is not to attempt to carry on branch banking, but, on the other hand, to avoid the doing of any act which might be classified or defined as branch banking. However, in arriving at a logical and intelligible conclusion in an opinion on the subject, it is not inappropriate, we think, to comment upon the facts and cite excerpts from the opinions rendered by our Courts defining branch banking, because the making of deposits and the places where such deposits are made by the depositors and received by a bank contrary to the terms of said proviso become the very essence of branch banking. The Supreme Court of this State, and our St. Louis Court of Appeals both hold that receiving deposits in violation of said provise in said Section 7949 constitutes branch banking and such acts being expressly prohibited by the statutes are ultra vires, and render the corporation subject to ouster by writ of quo warranto by the State, but in so far as receiving deposits at places other than at the banking house of a bank are concerned, as between a bank and its depositors, such acts, while ultra vires, are not void, but voidable only, with respect to their contractual relationship. The question of what constitutes branch banking, and the effects of branch banking, if carried on. was before the St. Louis Court of Appeals in the case

of Wellston Trust Co. vs. American Surety Co. of New York, reported in 14 S.W. (2d) 23. That was a suit on an insurance policy issued by the surety company to indemnify the trust company against loss of money by theft, burglary or robbery. The facts in the case were that the trust company had followed for a period of more than one year and a half the practice of its officers and agents going to the place of business of one of its customers to receive the customer's deposits, there make an entry of the amount of the deposit in the customer's bank book and then transport the money to the bank, a distance of several blocks away. The treasurer of the trust company and an attendant went to the office of the customer on the occasion of the loss of the money and received the money of the depositor, amounting to approximately \$4,000.00 as a deposit, entered the items making up the total sum in the customer's pass book, issued a duplicate deposit slip and started back to the bank with the money in an automobile, and, while so engaged in transporting the money to the bank the officer of the bank and the attendant were held up and the money was taken from them by the robbers. On the next day the bank entered the deposit on its books to the credit of the customer in the amount received by its agents and afterwards paid out that amount on the depositor's checks. Suit was brought by the trust company, or bank, against the surety company on its policy for the loss of the money. The surety company defended on the ground that the officer of the bank and the attendant were agents of the customer who made the deposit and not of the bank, and that, therefore, there was no liability to the bank under the policy because the loss was not covered by the policy, and that in any event, the acts of the bank in receiving the deposits away from the banking house were ultra vires and void and not to be anticipated by the contract or covered by the terms of the policy. The St. Louis Court of Appeals overruled the contentions of the surety company and held that the surety company was liable under the policy. The surety company took the case by a writ of certiorari to the Supreme Court where it is reported in 30 S.W. (2d) 100, and is titled State ex rel. American Surety Company of New York vs. Haid, et al. The contention of the surety company was that the decision of the St. Louis Court of Appe als was in conflict with previous controlling decisions by the Supreme Court. The Supreme Court held that there was no conflict between

the opinion of the Court of Appeals and the decisions of the Supreme Court. On this point Judge Ellison, as Commissioner, in rendering the opinion in the Supreme Court, 1.c. 103, said:

"We are not at liberty to inquire into the correctness of the Court of Appeals' construction of section 11799, Rev. St. Mo. 1919, holding the statute did not render void the act of the Wellston Trust Company in receiving the deposit of the People's Motorbus Company at the latter's office. Our sole province is to ascertain whether the opinion conflicts with previous controlling decisions of this court. * * * * ."

The Supreme Court in the same case, same page, farther along in the same paragraph said:

"* * * The only Supreme Court case cited, or ever decided so far as we are advised, bearing on that part of the statute, is State ex rel. Barrett v. First Nat'l Bank, supra, 297 Mo. 397, 249 S.W. 619, 30 A.L.R. 918, which holds that under the companion section 11737, national banks have no authority to maintain branch banks in this state—a very different thing. But the relator contends the opinion contravenes general principles announced in other cases and apposite rulings based on similar facts."

The Supreme Court case referred to by Judge Ellison concerns the establishment by national banks of branch banks in this State. It involved the construction of Section 11737, R.S. Mo. 1919.

The provisions of Section 11737, R.S. Mo. 1919, which were, as to the point in interest here, the same provisions as are contained in our present Section 7949, supra, and the interpretation of the meaning of the National Banking Act concerning the establishing of branch banks, as related to said Section 11737, R.S. Mo. 1919, were before our Supreme Court in the case of State ex rel. Barrett vs. First National Bank of St. Louis, 297 Mo. 397. A national bank had established a branch bank in St. Louis, Missouri. Its power to do so was challenged by the Attorney General of this State in an ouster proceeding in quo warranto. Our Supreme Court held that national banks could not establish

branch banks in States which have not granted such power, and restated the same rule in the State vs. Haid, et al. case, supra, saying that any attempt of National banks to establish branch banks in this State was not only an act in excess of their corporate powers, because not permitted by this State, but was in violation of an express statute.

The Court in the same case, in holding that the opinion by the St. Louis Court of Appeals, 14 S.W. (2d) 23, (the case there being reviewed by the Supreme Court) was not in conflict with the Barrett case, 1.c. 104, further said:

"Without continuing this abstract discussion further, our conclusion is that the mere presence in the statute, section 11799, Rev. St.Mo. 1919, of the proviso forbidding a trust company from maintaining a branch trust office and from receiving deposits except at its own banking house, did not of itself render void the particular transaction complained of in this case by reason of any general or fixed principle of statutory construction announced by the controlling decisions of this court; that many things beside the mere letter of a statute may enter into its construction, these varying with the particular legislation considered; and that no decision cited by the relator can be said to be based on facts so similar to those presented by this record as to make the respondents' opinion conflict therewith."

This left the opinion rendered by the Court of Appeals, 14 S.W. (2d) 23, undisturbed and decisive of the case. The St. Louis Court of Appeals in the Surety Company case, supra, held that while the reception of the customer's money by the agents away from the bank was ultra vires, it did not constitute grounds for avoiding payment of damages under its policy to the amount of the deposit made. The Court, 1.c. 28, said:

"We have examined the cases relied on by defendant with respect to this point, and find the principle announced therein inapplicable in the present case. The act of the plaintiff in receiving the deposits of the motorbus company outside the banking house, though ultra vires and in contravention of the statute, was not malum in se, nor criminal, nor did it affect the public morals. * * * ."

These quotations and the discussions by the Courts of the issues in the cases from which the citations are taken, are conclusive as to the construction the Courts have given the provise of paragraph 1 of said Section 7949. We think they will be helpful to us here in determining if the proposed plan of allowing patrons of the bank to place money or its equivalent in the pneumatic tube to be constructed by the bank on its parking lot to be delivered within the bank's building across the street to be there received by the bank as deposits, amounts to branch banking or not.

Sub-section 5 of said Section 7949, giving banks the right to purchase real estate and with respect to what shall constitute the banking house or place of business of a bank states the following:

"(a) A plot whereon there is or may be erected a building or buildings suitable for the convenient transaction of its business from portions of which not required for its own use a revenue may be derived."

The Inter-State National Bank of Kansas City, Missouri, does have such a business building on its own plot of ground on one side of Genesee Street in said city. The bank also owns a lot on the opposite side of said street, directly across from its banking house, for a parking lot for the convenience and assistance of its customers who drive automobiles to the parking lot to more readily transact their various items of business with the bank. This, we think, would be permissible and authorized by the terms of Section 5, Article XI of the Constitution of this State, 1945, because

holding and use of real estate adjoining the banking house lot for the use and benefit of the bank's customers may well be considered necessary and proper for carrying on the bank's legitimate business. It appears that the installation of the pneumatic tube between the parking lot and the bank building itself, to convey funds into the bank, is for the purpose of relieving customers who park their cars at the parking lot, from the necessity of proceeding therefrom across the street and back again to their cars, is for the accommodation of and benefit to the patrons of the bank and is an aid to the bank for the convenient transaction of its business.

The bank owns both the plot of ground upon which the bank building is erected and the parking lot on the opposite side of the street to the center of the street. We do not believe that it may be successfully controverted that the bank would have the authority and power, in making available such accommodation to its customers; to construct underneath the surface of the street, or above the surface of the street, which would not interfere with the use of the street by the public, any structure it needs for the use and benefit of its customers and which would aid the bank in its lawful business, since the city has an easement only in the use of the street and holds the title to the real estate constituting the street in trust only for the public, regardless of whether the dedication of real estate for street purposes was under the common law or under the statute, for the use thereof by the public for travel, the construction and laying of water mains or other instrumentalities underneath the surface of the street for the public health and safety. There are many decisions by the Supreme Court of this State to that effect. Our statutes so state. We do not deem it needful or proper to here quote authorities on this principle. One interested, however, will find the law so stated in Section 12809, R.S. Mo. 1939; Thomas vs. Hunt, 134 Mo. Rep. 392, 1.c. 399; Sneddy vs. Bolen, 122 Mo. Rep. 479, 1.c. 485; Ashurst vs. Lohoefner, 170 Mo. App. Rep. 327, 1.c. 331.

Our Courts have said that one place or building for carrying on the business of a bank is required, in order to localize and stabilize the banking business and to prevent the banking business from becoming a monopoly and from stifling competition in any community where branch banking would allow a bank to so extend its business and multiply its places of business as to result in potential destruction of competition.

Branch banking is not carried on, we think, by a bank where all the acts of making a deposit of money are transacted in the banking house except the initial step such as is proposed here by placing money in a pneumatic tube located on another plot of ground owned by the bank and immediately adjoining the banking house lot at the center of the street to be conveyed through said tube into the banking house for deposit.

The money, or its equivalent, placed in the pneumatic tube, as proposed here to be done, would pass directly and immediately to the inside of the bank and would not be in the custody of any person whomseever until it reached the counters of the bank inside the bank building. There would be no duplicate deposit slip made, no entering of the deposit upon the books of the bank, no calculating or summing up of the amount or value of the deposit until it reaches the hands of the employees of the bank inside the bank building. The money, or its equivalent, then, we believe, would not, and could not, become a deposit until it was in the custody and control of the bank officials or employees in the bank building itself, and a record made thereof. Volume 7, C.J., page 637, states the following text on what constitutes a deposit, to-wit:

> "A deposit is complete when the money passes from the possession of the depositor into the possession of an agent of the bank, within the bank, and during banking hours. # # # ."

It appears to be the same situation here as if a customer of the bank, desiring to make a deposit of funds in the bank should drive upon the parking lot named, and possessing some means of reaching over the surface of the street so that no interference with the use of the street would occur, should hand his money to an official of the bank through an open window or an open door, or the depositor should stand on the parking lot and toss his

deposit across the street into an open window or door of the bank, or that the bank, without interfering with any rights of the public or individuals, should construct a crossing above the street from the parking lot to the bank building in which a device which, for the want of a better designation, we will call a trolley basket, such as are used by clerks in stores to convey a purchaser's money to the cashier, and, in turn, the customer's change is conveyed back by the same means to the clerk for the customer, and such device would be used by a customer to convey money into the bank for deposit. Gould such deposits, effectuated by such instrumentalities, be called branch banking? We think not.

It is common knowledge that people from great distances from a bank, desiring to deposit their funds in the bank, use the United States mails to convey the deposit by letter to the banking officials at the bank's place of business. Messengers carrying money are constantly being sent from distant places by persons who wish to make deposits in a bank to convey their funds to the bank. Automobiles, armored trucks, aviation, and shipping facilities are used as instrumentalities to convey money to banks for deposit but the property conveyed does not become a deposit until it reaches the officials of the bank in the banking house and no person, we believe, could say that branch banking would be carried on by reason the use of any of these methods of conveying money to a bank for deposit.

Upon what ground would the distinction rest between any of the instrumentalities hereinabove named, and commonly used as methods of conveying meney to a bank for deposit, and the proposed plan here devised for the accommodation of a customer to place his deposit while on the parking lot of the bank in the pneumatic tube to be conveyed into the bank itself for the purpose of making a deposit of funds, to say that the one is branch banking, the other not branch banking? We think there are no such grounds for such distinction. None of them constitute branch banking.

Considering what our Courts have said, to the effect that branch banking, in so far as the incident of making a deposit is concerned, is receiving deposits outside of and away from the banking house, as expressed in the above citations, and considering further that the use of the parking lot, owned by the bank, for the installation of the pneumatic tube for the reception of money of customers to be deposited within the

bank and also as a convenience and necessity of the bank itself in carrying on its business, we believe that neither this enterprise, nor the methods used in utilizing it by customers of the bank to make their deposits, constitutes branch banking.

CONCLUSION

It is, therefore, the opinion of this department, considering the above cited and discussed authorities, and considering the fact that the use of the pneumatic tube to convey funds of customers from its adjoining lot across the street to the bank to become deposits in the bank, the use of which may very well be said to be a necessity and proper, not only as an accommodation to the customers of the bank, but for the convenient transaction of the business of the bank itself, it will not constitute branch banking for the Inter-State National Bank of Kansas City, Missouri, to install a pneumatic tube on a parking lot owned by the bank and situated directly across the street from the bank, which will pass under a public street and extend on up into the banking quarters where the funds of the customer would be delivered into the hands of the officers and employees of the bank within the banking house itself for deposit.

Respectfully submitted,

GEORGE W. CROWLEY Assistant Attorney General

APPROVED:

J. E. TAYLOR Attorney General

GWC:ir

JUVENILES: Board of Training Schools cannot accept child into their custody until properly committed by a court of competent jurisdiction.

June 9, 1949



Mr. W. E. Sears, Director Board of Training Schools Jefferson City, Missouri

Dear Mr. Sears:

Your letter of recent date requesting an opinion of this department reads as follows:

"Only recently officials of the Training School for Girls at Chillicothe, and this office were contacted by a sheriff of one of the northern counties of the State, regarding the possibility of placing a girl in our school for custodial purposes until such time as the judge of the appropriate district heard the case and made decision with regard to the delinquency problem of which the girl was charged. The sheriff was acting under instructions of the Circuit Judge who would hear the case within the next ten days.

"In view of the fact that no commitment had been made on the girl, a question arose as to whether or not the Missouri Training School Board, or the officials of the School under the Board's control, had the authority to accept the responsibility of handling the girl without due legal process.

In view of the facts outlined above, this office would appreciate receiving legal interpretation of the statute covering the possible admittance of girls for custodial purposes, without the benefit of a commitment order."

In checking the Missouri Statutes applicable to children referred to in the above letter, the Legislature recently passed and enacted a new law which is found in Vol II, Laws of Missouri 1947, page 320, Senate Bill 289, wherein we find Section 8994, which reads as follows:

Mr. W. E. Sears, Director

- "(1) Any boy over the age of 12 years and under the age of 17 years and any girl over the age of 12 years and under the age of 21 years who has been convicted of a crime or who is found by the juvenile or circuit court to be in need of training school education and discipline may be committed to the state board of training schools. Except where a child who is convicted of a crime and sentenced for a period of time which will not expire until after his 21st birthday, all commitments to the Board shall be made for an indeterminate period of time.
- "(2) The following persons shall not be committed to such board: (1) any child whom the court finds to be in need of parental care in a family home; (2) any epileptic, feebleminded or insane child; or (3) any child who has a communicable or contagious disease; except that the Board may, by regulation, when facilities for the proper care and treatment of persons having such diseases become available at any of the institutions under its control, authorize the commitment of children having such diseases to it for treat-ment and training in such institution. Notice of any such regulation shall be promptly mailed to the judges of all courts having jurisdiction of cases involving delinquent children. Any child under the age of twelve years who is convicted of a crime or who is found to be delinquent may be committed to the guardianship of the Division of Welfare of the State Department of Public Health and Welfare."

It will be noticed that this Section sets out specifically when and under what conditions a child, within the ages therein stated, may be committed to the care and custody of the Missouri Board of Training Schools. Reading the section in applicable terms, it means, that, only when a child within the limits set out has been convicted of a crime or who is found by the Juvenile Court to be in need

Mr. W. E. Sears, Director

of training school education and discipline may be committed to the Board of Training Schools.

The law does not provide for committing a child to the care and custody of the Board of Training Schools before one or the other of the above conditions exists and only then could the Board legally accept a child into its custody.

CONCLUSION

Therefore, it is the opinion of this department that no child within the age limits specified in Section 8994, Laws of Missouri 1947, Vol II, page 321, should be committed to the custody of the Missouri Board of Training Schools until a court of competent jurisdiction has found the child to be in need of training school education or discipline or has been convicted of a crime.

Respectfully submitted

GORDON P. WEIR Assistant Attorney General

APPROVED:

J. E. TAYLOR ATTORNEY GENERAL JUVENILES:

) Missouri Board of Training Schools shall accept MISSOURI BOARD OF) custody of a boy over the age of 17 who has been TRAINING SCHOOLS:) committed to the custody of the Board of Training Schools before his 17th birthday.

June 14, 1949

Hon. W. E. Sears, Director Board of Training Schools Jefferson City, Missouri

Dear Mr. Sears:

Your request for an opinion of this office relative to the commitments of juveniles reads as follows:

"Will you please forward an opinion on the following question.

"Can a boy who has been found delinquent by the Juvenile Court and sentenced, but placed on probation by the Juvenile Court, while he was under 17 years of age, be received by the training school on a commitment after he has passed his 17th birthday?"

Paragraph 1 of Section 8994, of Senate Bill 289 approved March 4, 1948; Laws of Missouri 1947, Volume II, at page 320, 1. c. 321 provides as follows:

> "Any boy over the age of 12 years and under the age of 17 years and any girl over the age of 12 years and under the age of 21 years who has been convicted of a crime or who is found by the juvenile or circuit court to be in need of training school education and discipline may be committed to the state board of training schools. Except where a child who is convicted of a crime and sentenced for a period of time which will not expire until after his 21st birthday, all commitments to the Board shall be made for an indeterminate period of time."

The pertinent part of the above paragraph is, "Any boy over the age of 12 years and under the age of 17 years * * * * * * * who has been convicted of a crime or who is found by the juvenile or circuit court to be in need of training school education and

Hon. W. E. Sears.

discipline may be committed to the state board of training schools."

Notice will be taken that this section does not make reference to delinquent boys -- as such -- and the nearest reference to this class of boys is, "who is found by the juvenile or circuit court to be in need of training school education and discipline."

Section 9673, R.S.A. Mo. 1939 applies to 1st and 2nd class counties and in part reads as follows:

Section 9698, as amended, Laws of 1945, page 627, 1. c. 628, House Bill No. 679, Sec. 1, Mo. R.S.A. Vol. 20, Cum. Pocket Part, page 143, is pertinent to this issue, and, in part, reads as follows:

"This article shall apply to children under the age of seventeen years, in counties of the third and fourth classes, who are not now or hereafter inmates of any state institution or any institution incorporated under the laws of the state for the care and correction of delinquent children. When jurisdiction has been acquired under the provisions hereof over the person of a child, such jurisdiction shall continue, for the purpose of this article, until the child shall have attained the age of 21 years. * * * * *

It will be noted by this section that when jurisdiction by the juvenile court has once been acquired, such jurisdiction shall continue until the child reaches the age of twenty-one years.

In the case of State ex rel. Boyd v. Rutledge, Circuit Judge, 13 S. W. (2d) 1061, the court said, at 1. c. 1065, and 1066:

Hon. W. E. Sears.

"Now there is no provision anywhere for the trial in a court of general jurisdiction of a boy under 17 charged with crime, and a transfer of the cause from that court to a juvenile court in the event of his conviction, in order that he may be sentenced by the latter court. Hence the inference necessarily follows that such a boy can be tried only in the juvenile court. We conclude, therefore, that the juvenile court has exclusive jurisdiction in all cases in which persons under 17 years of age are charged with either delinquency or the commission of crime. The giving to the juvenile court exclusive jurisdiction, even in cases in which a boy under 17 is proceeded against on a criminal charge, is in consonance with the general purpose of the act. juvenile court has a broader latitude than a court of exclusive criminal jurisdiction in the imposition of punishment. * * * * * * *

"When a delinquent child is brought before a juvenile court charged with the violation of a criminal statute, the judge of that court must determine in the first instance whether such child shall be proceeded against as a delinquent, or prosecuted under the criminal law. If the child is then under 17 years of age, the further proceeding, whichever it may be, must be had in his court; if the child is then 17 years of age or over, the judge may, if he determines that the child should be prosecuted under the general law, either direct the trial to proceed in his own court, or order the cause transferred to a court having general criminal jurisdiction. When a child who has passed his seventeenth birthday is brought before a court of general criminal jurisdiction, charged with having committed a criminal offense while under 17 years of age, that court may determine whether he should be dealt with as a delinquent, or prosecuted under the general law, and, if it decides that he should be proceeded against as a delinquent, order the cause transferred to the juvenile court. But a court of general criminal jurisdiction is wholly without jurisdiction in cases in which a child under 17 years of age is charged with the violation of criminal law; without jurisdiction

to even determine which course should be pursued with respect to such child."

According to Section 9698, supra, and the holding of the court in the case of State ex rel. Boyd v. Rutledge, supra, since the juvenile court acquired jurisdiction over the boy in question, and proceeded against him and rendered judgment in the juvenile court, he being sixteen years of age at the time of the charge and of the sentence, such judgment is final and the court would be without authority to resentence the defendant in a court of general jurisdiction to a term in the Intermediate Reformatory at Algoa.

Section 4106, R. S. Mo. 1939 provides and reads as follows:

"Where any convict shall be sentenced to imprisonment in the penitentiary, the clerk of the court in which the sentence was passed shall forthwith deliver a certified copy thereof to the sheriff of the county, who shall, without delay, either in person or by general and usual deputy, cause such convict to be transported to the penitentiary and delivered to the keeper thereof."

Thus it is the duty of the clerks to forthwith deliver a certified copy of the sentence to the sheriff.

In the case of Williford v. Stewart, 198 S. W. (2d) 12, 1. c. 14 and 15 the Supreme Court of the State of Missouri said:

"With the case standing as it does the question is, shall the judgment shown in the commitment prevail over the judgment and minutes certified to us directly by the circuit clerk. We think the answer cleary is that we must accept the latter as authentic. As a matter of fact, the only commitment required by the statute And Sec. 9057 provides that when the convict is delivered to the Commission of the Department of Penal Institutions, the officer having him in charge shall deliver to the Commission the certified copy of the sentence previously received by such officer from the clerk of the court. This, of itself, is enough to show the judgment and sentence are controlling. A commitment Mr. W. E. Sears.

Section 9688 R. S. Mo. 1939 in part reads as follows:

From the above citations the writer is of the opinion that when the juvenile court once acquires jurisdiction over a boy, that, jurisdiction continues until he attains his majority and when sentenced by the juvenile court to the Missouri Training School while within the age limits prescribed in Section 8994, Laws of 1917, such boy can and should be accepted by the Board upon delivery to them although the boy has passed his 17th birthday at the time of delivery since the sentence and judgment of the court is the commitment and carrying out of the statutory requirement by the clerks is a ministerial act.

CONCLUSION

Therefore, it is the opinion of this Department that a boy semtenced for delinquency by the juvenile court to the custody of the Missouri Board of Training Schools, while under the age of 17 can legally be accepted by the Board of Training Schools, after he attains the age of 17 and before he becomes twenty-one years of age.

To say otherwise would be to say that a boy placed on probation by the juvenile court would be nothing more or less than a dismissal of the case on the boy's 17th birthday.

Respectfully submitted

APPROVED:

GORDON P. WEIR Assistant Attorney General

J. E. TAYLOR ATTORNEY GENERAL

GPW:A

COUNTY BOARDS OF EQUALIZATION

Deputy County Surveyor may not serve in place of County Surveyor as a member of County Board of Equalization.

July 14, 1949

Mr. Sam Semple Prosecuting Attorney Moberly, Missouri FILED 81

Dear Sir:

This is to acknowledge receipt of your request for a legal opinion of this department based on facts outlined in your letter and summarized as follows:

Mr. Hamilton B. Holman is the duly elected, qualified and acting county surveyor of Jackson County, Missouri, and as such has the legal authority to appoint deputy surveyors to assist him in the performance of his duties. That in counties of the third class (to which class Randolph County belongs) the county surveyor is a member of the County Board of Equalization.

The question now arises as to whether or not one of the deputy surveyors appointed by Mr. Holman may sit in his place and perform his duties as a member of the County Board of Equalization.

Section 11001, Laws of Mo. 1945, page 1775, creates the County Board of Equalization in each county of the state, and reads as follows:

"In every county in this state, except as otherwise provided by law, there shall be a county board of equalization consisting of the judges of the county court, the county assessor, the county surveyor, and the county clerk who shall be secretary of the board without vote. This board shall meet at the office of the county clerk on the second Monday in July, 1946, and on the second Monday of July of each year thereafter: Provided, that in any county having township organization the sheriff of said county shall also be a member of the board of equalization."

Section 11002, Laws of Mo. 1945, page 1775, defines the powers, duties and oath of the members of the County Board of Equalization and reads as follows:

"The members of the county board of equalization shall each take an oath, to be administered by the clerk, to fairly and impartially equalize the valuation of all taxable real estate and tangible personal property in the county. Said board shall have the power and the duty to hear complaints and to equalize the valuation and assessments upon all taxable real and tangible personal property within the county so that all such property shall be entered on the tax book at its true value: Provided, that said board shall not reduce the valuation of the real or tangible personal property of the county below the value thereof as fixed by the State Tax Commission."

Under the provisions of Section 13208, R. S. Mo. 1939, the Surveyor of Randolph County had the authority to appoint deputies to assist him in the performance of the duties of his office. Before entering upon the discharge of their duties the deputies were required under the provisions of this section to take an oath, "To well, truly, and faithfully discharge the duties of deputy surveyors." Ordinarily the deputy of a public official must possess the same qualifications, and may perform any or all of the duties of such public official. The actions of the deputy then become those of the principal, and he is held legally responsible for the actions of such deputy.

In view of this general principle of law, it would seem that a deputy surveyor of Randolph County might take the place of and perform the duties of the County Surveyor as a member of the County Board of Equalization of said county, in the absence or inability of the surveyor to act.

However it is noted that the oath of office to be taken by deputy surveyors, as provided by section 13208 supra, referred only to the faithful performance of the duties of deputy surveyors. The deputy might legally perform the duties of the office to which he had been appointed, among which would would be that of acting in the place of his principle in the absence or inability of that official to act. He would have no legal authority to perform the duties of another or different office than that to which he had been appointed, and in the event he were to attempt to act as a deputy to some other official than that of county surveyor, his acts would be a mere nullity.

Section 11001 supra, named the officials who were to compose the County Board of Equalization. No other officer or person than those named could become a member. The members of this board who were all county officials became members by virtue of this provision of the statute, and not because they had been elected to a county office.

As noted above the County Surveyor of Randolph County may appoint a deputy surveyor under the provisions of Section 13208 supra, but there is no statute authorizing the appointment of a deputy member of the County Board of Equalization. It would therefore follow that a deputy county surveyor would not be and could not become a deputy member of the Board of Equalization and could only perform the duties of a deputy county surveyor.

Even though it were assumed that a deputy county surveyor might legally perform the duties of his principle as a member of the County Board of Equalization, regardless of the reasons heretofore given, it is further contended that a deputy county surveyor could not perform these duties for reasons to be noted hereafter.

In the absence of statutory provisions authorizing the appointment of a deputy member of said Board, such action must be justified by common law, if at all.

Under the common law rule in effect in Missouri, a public official might appoint a deputy to perform ministerial duties. The appointment of a deputy to perform duties requiring discretion and of a judicial nature has not been authorized in Missouri.

In the case of State ex rel. v. Reber, 226 Mo., 1.c. 234, the court said:

"As has been said already the duties of the president of the board of public improvement are of two kinds, the one is such as requires the exercise of discretion and judgment, involving often scientific and technical knowledge, the other requires the performance of mere ministerial or clerical work. The duties first mentioned cannot be delegated, those of the ministerial kind may be delegated to with proper care."

Other cases upholding this general rule are: Small v. Field, 102 Mo., l.c. 119; Am. Jur., Vol. 43, page 221; Hunter v. Hemphill, 6 Mo., 106.

Section 11002 supra, makes it the duty of the County Board of Equalization to hear complaints and to fairly and impartially equalize the valuation and assessments upon all taxable property located in the county, in order that all such property may be entered on the tax book at its true value. It is readily seen that the performance of the duties outlined in this section calls for the exercise of sound discretion, knowledge of the value of the taxable property within the county, some knowledge of the laws relating to taxes, general business experience, and good judgment are all essential if said Board is to successfully perform the duties enjoined upon it by the statute. Such duties are of a judicial nature and it would be neither legal or practical to assign them to some clerk or other ministerial subordinate who was less qualified to perform them than themselves.

Missouri cases in which it has been held that the duties of a county board of equalization in equalizing the value of property are of a judicial nature are cited as follows: Black v. McGonigle 103 Mo. 193; State ex rel. Johnson v. Bank, 279 Mo. 228; Kennen et al v. McFarling et al, 165 S.W. (2d) 681.

CONCLUSION

It is therefore the opinion of this department that a duly elected, qualified and acting county surveyor may appoint deputy surveyors under the provisions of Section 13208, R. S. Mo. 1939. That such deputies may perform any of the duties of the positions to which they have been appointed, and may act in the place of the principle when required.

It is the further opinion of this department that under the provisions of Section 11001, R.S. Mo. 1939, the county surveyor is a member of the County Board of Equalization, and that said office is separate and distinct from that of county surveyor. That said section makes no provision for, nor does it authorize the appointment of a deputy-member of the County Board of Equalization. The duties of said Board are of a judicial nature, and may not be delegated to another for performance. It therefore follows that a deputy county surveyor could not become a deputy-member of the County Board of Equalization and would have no authority to act for his principle when the surveyor could not be present

as a member of said Board. The deputy surveyor would only have authority to perform the duties of the position to which he had been appointed, namely, deputy county surveyor.

For the foregoing reasons the duties of the county surveyor as a member of the County Board of Equalization may not be delegated to a deuty surveyor, but must be personally performed by such county surveyor.

Respectfully submitted,

PAUL N. CHITWOOD Assistant Attorney General

APPROVED:

J. E. TAYLOR Attorney General CONSTITUTIONAL LAW)
OFFICERS

Provisions of House Bill No. 297 of the Sixty-Fifth General Assembly applicable to incumbents in office of Prosecuting Attorney during current term.

July 27th, 1949

1/28/49

FILED

Honorable Sam Semple Prosecuting Attorney Moberly, Missouri

Dear Sir:

This department is in receipt of your request for an official opinion which reads as follows:

"House Bill No. 297, passed by the present General Assembly and signed by the Governor, provided for additional compensation for Prosecuting Attorneys, for attending inquests by coroners in cases of death occuring by violence.

"Article VII, Section 13 of the Constitution of Missouri, 1945, provides that the compensation of a county officer shall not be increased during the term of office.

"May I have your opinion as to whether incumbent Prosecuting Attorneys are entitled to this increase?"

As stated in your request, the Sixty-Fifth General Assembly has enacted House Bill No. 297, which imposes certain duties upon Prosecuting Attorneys, in addition to those previously required by law to be performed by such officers. In addition, provision is made for compensation for such additional duties.

Section 13, Article VII, Constitution of 1945, reads as follows:

"The compensation of state, county and municipal officers shall not be increased during the term of office; nor shall the term of any officer be extended."

Under the Constitution of 1875, the following prohibition upon such increase in compensation or fees appeared as Section 8 of

Article 14, reading as follows:

"The compensation or fees of no State, county or municipal officer shall be increased during his term of office; nor shall the term of any office be extended for a longer period than that for which such officer was elected or appointed."

Several cases were decided under this provision which we deem pertinent to your request.

As has been pointed out, the new duties imposed upon Prosecuting Attorneys by House Bill No. 297 of the Sixty-Fifth General Assembly were not previously incident to the discharge of the duties of that office. In the premises we believe the case of Little River Drainage Dist. v. Lassiter, 29 S.W. (2d) 716, 325 Mo. 493, to be in point. In that case the Supreme Court of Missouri was construing the constitutionality of an act providing for additional fees to be allowed township collectors for collecting drainage district taxes. The rule was therein stated in the following language:

"The constitutional inhibition only applies to compensation or fees of officers for performing duties incident to their offices, and has no application to additional duties imposed upon such officers not ordinarily incident to their offices.

State ex rel. McGrath v. Walker, 97 Mo.
162, 10 S. W. 473; State ex rel. Hickory County v. Dent, 121 Mo. 162, 25 S. W. 924; State ex rel. Linn County v. Adams, 172 Mo.
1, 72 S. W. 655; State ex rel. Harvey v.
Sheehan, 269 Mo. 421, 190 S. W. 864; State v. Zevely v. Hackmann, 300 Mo. 59, 254 S. W.
53; State ex rel. Barrett v. Boeckler Lumber Co., 302 Mo. 187; 257 S. W. 453."

(Underscoring ours.)

In view of the similarity of phraseology and meaning of the two constitutional provisions quoted supra, we believe that the rule quoted authorizes the payment to the respective Prosecuting Attorneys from and after the effective date of House Bill No. 297 of the Sixty-Fifth General Assembly, of the additional compensation provided therein.

CONCLUSION.

In the premises we are of the opinion that by reason of the imposition upon the several Prosecuting Attorneys of the various counties of this state of additional duties which are not ordinarily incident to their offices by House Bill No. 297 of the Sixty-Fifth General Assembly, such act does not violate the provisions of Section 13 of Article VII, of the Constitution of 1945, by providing additional compensation for such additional duties.

Respectfully submitted,

APPROVED:

WILL F. BERRY, JR. Assistant Attorney General

J. E. TAYLOR Attorney General

WFB/few

JUVENILES:

Missouri State Board of Training Schools, authorized to transfer juveniles placed in their care to the State Hospital at Farmington, Missouri for specialized care and treatment.

November 22, 1949

11/23/49

Hon. W. E. Sears, Director Board of Training Schools State of Missouri Jefferson City, Missouri

Dear Mr. Sears:

Your request of recent date for an opinion of this department relative to the transfer of boys and girls from the various training schools under the control of the Board of Training Schools to State Hospital No. 4 at Farmington, Missouri, for the purpose of psychiatric treatment, is rather lenghty, and for brevity's sake your letter will be incorporated in this opinion by reference.

The question, when analyzed, appears to be: "Is the Board of Training Schools authorized, under Sections 9010 and 9011, Vol. II of the Session Acts of 1947, at page 325, found in the pocket part of the Annotated Statutes of Missouri 1939, at pages 65 and 66, to transfer juveniles placed in the care of the Board of Training Schools, to the Division of Welfare for psychiatric treatment, until it is determined by the Board that the child's condition is improved to the extent that he or she can be returned to the care and custody of the institution from which he or she was transferred, or until it is determined by the Board and the psychiatrist in charge that the child should not be returned to the school but referred back to the committing court, as provided for in Section 8995, Laws of 1947, Vol. II, page 322.

Section 9759.1, page 148 of the pocket part of the 1939 Revised Statutes of Missouri, and Section 1, page 945, Laws of 1945, reads in part as follows:

"There is hereby created and established as a department of state government a department of public health and welfare, which may hereafter be referred to as the department. The scope and purpose of the department of public health and welfare shall be to improve and protect the health of the people of the State

Hon. W. E. Sears

of Missouri; to care for the mentally ill
and those who are ill from other causes, so
far as the laws of Missouri shall provide;
to provide care and maintenance for certain
other persons, as provided by law; to
administer laws concerning social welfare,
including certain social security laws. * * *"
(Underscoring ours)

Section 9759.27, page 155 of the pocket part of the Revised Statutes of Missouri 1939, and Section 27, page 952, Laws of 1945, reads as follows:

"All state institutions and activities which have heretofore been known as eleemosynary, shall hereafter be known and designated as health and welfare institutions and activities. With approval of the department of public health and welfare, the division of mental diseases shall make all necessary orders for the government, administration, discipline and management of all institutions and activities having to do with the care and treatment of persons suffering from mental diseases, not inconsistent with the laws of this state."

This section provides that all state institutions heretofore known as eleemosynary shall be known and designated as health and welfare institutions. Therefore, State Hospital No. 4 at Farmington, Missouri, having previously been designated as an eleemosynary institution, is by this section a health and welfare institution and is under the control of the Department of Health and Welfare of the State of Missouri.

Section 9010, page 65 of the pocket part of the Revised Statutes of Missouri 1939, found in Vol.II at page 325 of the Session Acts of 1947, reads as follows:

"It shall be the duty of the division of welfare of the state department of public health and welfare to cooperate with the board of training schools to furnish foster home care as needed, other specialized care for children, and any other welfare services which may aid in the rehabilitation of children under the supervision of the board of training schools."

(Underscoring ours)

Hon. W. E. Sears

We observe in this section that it shall be the duty of the Division of Welfare of the State Department of Public Health and Welfare to cooperate with the Board of Training Schools and to furnish specialized care for children.

Section 9011, page 66, of the pocket part of the Revised Statutes of Missouri, 1939, found in Vol.II at page 325 of the Session Acts of 1947 reads:

"Every agency or instrumentality of the State government shall cooperate with the board at its request to the extent authorized by law in promoting the welfare of children committed to the board and in the development of services rendered by the board."

This section specifically states that every agency or instrumentality of the State Government shall cooperate with the Board at its request to the extent authorized by law, in promoting the welfare of children committed to the Board.

The situation at hand calls for an interpretation and application of Sections 9010 and 9011 supra, and in this instance Sections 9759.1 and 9759.27 should be read with the two preceding mentioned sections in order to determine if the Board of Training Schools can, for the welfare of the child committed to its care, transfer such child who may be in need of psychiatric treatment to the custody of Division of Welfare for treatment at State Hospital No. 4, Farmington, Missouri, where arrangements have been made by the Board with the officials of that institution and the officials of the Division of Health and Welfare, but without relinquishing the custody of such child.

Apparently the Legislature, in enacting these sections, intended that they should be applied in their broadest sense and to the best advantage of children needing specialized care and treatment, and so directed that the Division of Welfare should cooperate with the Board of Training Schools in administering such specialized care for children who are in need of psychiatric treatment, and to treat a child coming in this class would require specialized care, which the institution under the control of the Board of Training Schools is not at this time equipped to render.

In view of the present situation, the Board of Training Schools, which is required to act for the best welfare of the

Hon. W. E. Sears

child placed in their care, should be, and we think are, authorized to make such necessary transfers of any child committed to their care and custody, to the State Hospital No. 4 at Farmington, Missouri, where arrangements have been made, and facilities are accessible to treat such deficient children.

CONCLUSION

Therefore, it is the opinion of this department that the Board of Training Schools is legally authorized by the sections of the law set out above to transfer temporary custody of any child in need of psychiatric treatment to the State Hospital No. 4, at Farmington, Missouri, in care of the Division of Welfare, until such child can be rehabilitated to where he or she can be returned to the institution under the control of the Board of Training Schools, or until it becomes apparent that such child cannot be returned because of his or her condition, at which time it will be necessary to refer the case back to the committing court as provided for by law.

Respectfully submitted

GORDON P. WEIR Assistant Attorney General

APPROVED:

J. E. TAYLOR ATTORNEY GENERALLY

GPW: A

JUVENILES: Industrial Home for Girls at Chillicothe cannot legally detain and restrain a child committed to their care beyond the child's twenty-first birthday.

December 6, 1949

FILED 81

Mr. W. E. Sears, Director Board of Training Schools Jefferson City, Missouri

Dear Mr. Sears:

Your letter of recent date requesting an opinion of this department reads as follows:

"It would be appreciated by this office if we could secure an Opinion as to whether or not Ruth Mary Gregory, a girl now at the Training School for Girls, Chillicothe, Missouri, could be retained at the school or remain under supervision of the Missouri Training School Board after reaching the age of 21, which will be January 27, 1950.

"The above named girl was sentenced for ten years when she was 17 years of age and to be of assistance, we are hereby attaching a copy of the sentence and judgment of the Court at the time she was committed to the training school."

The request involves the restraint of a particular person, however the principle involved might be applicable to another at any time.

At the time Ruth Mary Gregory was sentenced for the crime of armed robbery to the State Penitentiary for a term of ten years, she was seventeen years of age, said sentence being ordered by the trial court to be served in the Industrial Home for Girls at Chillicothe. This sentence was imposed by a court of general criminal jurisdiction according to the laws applicable to First Degree Robbery, and she was committed to the Industrial Home for Girls as provided for in Section 9011, R. S. Mo. 1939, which law was in effect at the time of the sentence, but since repealed.

The repealing of this law does not affect the sentence

imposed upon the person in question and the enactment of the new law (Section 8994, Vol. II, Laws of 1947, page 321) found at page 62 of the pocket parts of the Revised Statutes of Missouri, 1939, does not take precedence to the extent that the Home would have any greater power over such child than that law provided, nor can it affect the sentence so imposed under the prior law.

Section 661, R. S. Mo. 1939, reads as follows:

"No offense committed, and no fine, penalty or forfeiture incurred previous to the time when any statutory provision shall be repealed, shall be affected by such repeal; but the trial and punishment of all such offenses, and the recovery of such fines, penalties and forfeiture, shall be had, in all respects, as if the provisions had remained in force.

(Underscoring ours)

The court, in sentencing this party to the State Penitentiary, then ordering the same to be served in the Industrial Home for Girls by operation of law commuted the same to a term no longer than the Home would legally be entitled to restrain her, which in this instance would be until her twenty-first birthday, at which time she would be entitled to be discharged.

Section 9011, R. S. Mo. 1939 (now repealed) provided as follows:

"All commitments to the industrial home for girls of girls, over the age of twelve and under the age of eighteen shall be made by the juvenile division of the circuit court. Every girl over the age of twelve years and under the age of twenty-one years, who shall be convicted of any offense not punishable with imprisonment for life, or whose associations are immoral or criminal, or bad or vicious, or who is incorrigible to such an extent that she can not be, controlled by her parents or guardian in whose custody she may be, may be sentenced to said industrial home until

she shall reach the age of twenty-one years, if the court or magistrate before whom such conviction shall be had, deems the girl so convicted a fit subject to be committed to said home, and the age of the girl so committed to be indorsed on the commitment in case any such child is under twelve years of age, the same to be placed under the control of the state social security commission."

(Underscoring ours)

It will be noticed that this section provides that a girl could be sentenced to the Industrial Home for Girls until she reached the age of twenty-one years; no provision was made for further restraint by that institution after the child reached her twenty-first birthday.

It follows therefore that the authorities in charge of the State Industrial Home for Girls could not legally detain or restrain any child committed beyond their twenty-first birthday, and in this case where the trial court imposed a ten year prison sentence upon a seventeen year old child, the same to be served in the Industrial Home for Girls, did by operation of law commute that sentence to a period of time which would not extend beyond the child's twenty-first birthday.

CONCLUSION

Therefore, it is the opinion of this department that the Circuit Court in sentencing Ruth Mary Gregory for a term of ten years to the Missouri State Penitentiary to be served in the Industrial Home for Girls at Chillicothe

by operation of law commuted said sentence to a term no longer than that which the law would permit the institution to detain and restrain such minor which would be until she reached her twenty-first birthday, and it follows that such child is entitled to be discharged on attaining that age.

Respectfully submitted,

GORDON P. WEIR Assistant Attorney General

APPROVED:

J. E. TAYLOR Attorney General REPEAL OF TOWNSHIP ORGANIZATION CHAPTER CONTEMPLATED BY SENATE BILL NO. 72, 65th GENERAL ASSEMBLY. Proposed amendment to Senate Bill No. 72 providing that county treasurers in former township organization counties shall be county collectors until successors are elected and qualified is unconstitutional as local and special law.

May 3, 1949

5.9



Honorable Forrest Smith Governor of Missouri Jefferson City, Missouri

Dear Governor Smith:

We are in receipt of your letter of April 19, 1949, in which you request an opinion of this department, your letter is as follows:

"I am enclosing Perfected Senate Bill No. 74. A proposed amendment to this bill has been suggested as follows: 'Provided, however, that each county treasurer, in counties under township organization elected in 1948, shall serve as county collector from January 1, 1950, until his successor is duly elected and cualified.

"I would like to have an opinion from your department as to whether this amendment would affect the legality of Senate Bill No. 74 as it is now written if it were adopted.

"In township organization counties the officers are elected as county treasurers and as county treasurers they are ex-officio collectors. Since they are elected to the office of county treasurer can they surrender the office of treasurer and continue to serve as ex-officio collectors."

We have given careful consideration to your aforesaid letter and have examined Senate Bill No. 74 and considered it in the light of the proposed amendment, and we believe it desirable for us to make some comments which we believe pertain to your inquiry and the question submitted therein.

The effect of Senate Bill No. 72, if enacted into law without the proposed amendment mentioned and quoted in your letter would

be the complete abolition of the township form of government in every county in the State in which said form of government now exists, including the abolition of the right and duty of county treasurers in counties in which that form of government now exists to act as ex-officio county collectors. Such right and duty on the part of county treasurers in such counties is derived from the provisions of Section 13989, R.S.A. Mo., 1939, which section is in part as follows:

"The county treasurer of counties having adopted or which may hereafter adopt township organization shall be ex-officio collector * * *."

The section of the statute last above quoted would be repealed if Senate Bill No. 74 should be enacted into law along with all other sections pertaining to and providing for the township form of government. The right of the Legislature to make provisions in the section last above quoted to the effect that county treasurers in township organization counties should be ex-officio county collectors would have been subject to doubt upon the theory that such provisions for the collection of taxes and as to the persons by whom the duty was to be performed when made applicable to some counties in the State and not to others would be local or special law violative of Article 3, Section 40, Paragraph 21 of the Constitution of the State of Missouri, and also Article 4, Section 8 of said State Constitution if it were not for the fact that according to the law providing for the township organization form of government, such form of government might be adopted by, and also available to any and every county in the State and was therefore of general rather than local or special application, and if not for the further fact that the change in the law as to how taxes were to be collected and by whom they were to be collected was a part of the township organization plan. Any seeming violation of the local and special law provisions of the State Constitution by the provision for the township form of government was certainly eliminated by the following provision of Article 6, Section 9 of the 1945 State Constitution:

> "Alternative forms of county government for counties of any particular class and the method of adoption thereof may be provided by law."

It follows that if the Legislature was given the power by the Constitution to provide for an alternative form of county government, or in other words, a form of county government other than the one in general use throughout the State, such alternative form of county government when devised could properly include arrangements as to how the work of the county was to be accomplished and by what officers it was to be done. It was therefore constitutional for the Legislature, if it so desired, to make the provision that taxes were to be collected by the county treasurer who was to serve as ex-officio county collector. Furthermore, even before the last above quoted provision was incorporated in the Constitution the Supreme Court of Missouri in response to a resolution by the House of Representatives requesting a judicial declaration as to the constitutionality of the statute on township organization had declared it to be a general plan in the following language:

"* * * This Township organization law contains no provisions, so far as we are able to see, prohibited by the Constitution. It is a general law made for the whole State, and by the terms of the act itself took effect from and, after its passage. Every county in the State may avail itself of the privileges offered by this la w by a majority vote of its people. left to the option of the counties, whether they will organize under the law or not. If a majority vote for it, such vote does not create the law, but places the county so voting within its provisions, and the organization then takes effect, and also the law, as it existed before the vote was taken. The law does not delegate, nor was it the intention of the lawmakers to delegate legislative authority to the counties. Unless the counties avail themselves of the right to organize they will remain as they were, unaffected by any of the provisions of this statute."

Opinion of the Supreme Court Judges on Township Organization Law, 55 Mo., 295, 1.c. 296 and 297.

However, if Senate Bill No. 72 is enacted into law the whole plan of township form of government and the right of counties to adopt such form of government is completely abolished and along

with it the provision as above set forth for the collection of taxes by county treasurers acting as ex-officio county collectors is repealed. This then would leave all counties now under township organization without ex-officio county collectors and without any other kind of a county collector, and the general law applying to the State as a whole and providing for the office of county collector and defining the duties of that office would then be in effect in the counties now under the township organization plan.

We assume that the proposed amendment set forth in your letter has been designed with a view to avoiding the confusion involved in the abolition of the right and duty of county treasurers in counties under township organization to act as ex-officio county collectors by simply providing that the county treasurers who under the law being repealed would have served as ex-officio county collectors shall beginning January 1, 1950, serve as county collectors until their respective successors shall be duly elected and qualified.

We are of the opinion, however, that although the chapter in the Revised Statutes of Missouri, 1939, being chapter 101 and including sections 13928 to 14024, which Senate Bill No. 74 is designed to repeal was constitutional as a whole including the provision that county treasurers in township organization counties should serve as ex-officio county collectors nevertheless, the proposed amendment to said Senate Bill which undertakes to provide that county treasurers in said prescribed counties, but not in counties generally throughout the State, and who shall have been elected in 1948, shall serve as county collectors from January 1, 1950 and until their respective successors are duly elected and qualified is unconstitutional because it undertakes to limit the application of this law to counties which are now governed under the township organization plan, and is therefore a local or special law.

The names of these counties are readily ascertainable, and legislation designed to effect only counties now under the town-ship organization form of government, and not within the terms and provisions of any special permissive provision of the Constitution, is as truly specific in its application as if the amendment designated the counties by name. This is in direct violation of Article 6, Section 8 of the Constitution of Missouri, which reads as follows:

"Provision shall be made by general laws for the organisation and classification

of counties except as provided in this Constitution. The number of classes shall not exceed four, and the organization and powers of each class shall be defined by general laws so that all counties within the same class shall possess the same powers and be subject to the same restrictions. A law applicable to any county shall apply to all counties in the class to which such county belongs."

(Underscoring ours)

It is quite obvious that a law providing that county treasurers in certain designated counties shall be county collectors from and after January 1, 1950, and until their respective successors are duly elected and qualified is designed to be applicable only to the counties designated, and is therefore not applicable to all counties in the particular classes to which the respective designated counties happen to belong, and is therefore contrary to the above quoted provision of the Constitution to the effect that: "A law applicable to any county shall apply to all counties in the class to which such county belongs."

Such a provision is also in direct violation of Article 3, Section 40 of the Constitution of Missouri, which is in part as follows:

"The general assembly shall not pass any local or special law:

"(21) Creating offices, prescribing the powers and duties of officers in, or regulating the affairs of counties, * *."

It is clearly apparent that a law which provides that county treasurers elected in 1948 in certain designated counties, which counties happen to be such counties as were under the township organization plan before the law providing for that plan was repealed shall be county collectors in the respective counties from and after January 1, 1950, and until their respective

successors are duly elected and qualified is a law creating offices, prescribing the powers and duties of officers in, and
regulating the affairs of counties within the meaning of subdivision 21 of Article 3, Section 40 of the Constitution of
Missouri hereinbefore quoted and being by its terms applicable
only to such counties as were once under the township form of
government is a local or special law and is therefore in violation of the constitution prohibition set forth in Article 3,
Section 40, subdivision 21 of the Constitution of the State of
Missouri, supra.

CONCLUSION.

We are therefore of the opinion that the proposed amendment to Senate Bill No. 74 is unconstitutional because it amounts to a local or special law within the meaning of the above cited constitutional prohibition of such laws, and we are of the fur-ther opinion that if the repeal contemplated in Senate Bill No. 72 shall be accomplished there is no constitutional way in which to provide that the county treasurers elected in 1948 in township organization counties shall be county collectors in such counties from and after January 1, 1950, and until their successors are duly elected and qualified, and we are of the further opinion that in the event of the repeal contemplated by Senate Bill No. 74, there will be no such office as ex-officio county collector in any of such counties as are now under the township form of government, and that the office of county collector in each of said counties will exist as a matter of general law as it exists in all other counties beginning with the effective date of Senate Bill No. 74, but while the office will exist it will be vacant in each of said counties from and after the effective date of the law embodied in said Senate Bill.

Respectfully submitted,

APPROVED:

SAMUEL M. WATSON, Assistant Attorney General

J. E. TAYLOR Attorney General MISSOURI SECURITIES LAW EXEMPTIONS
CORPORATIONS
EXEMPTIONS UNDER MISSOURI SECURITIES LAW
PUBLIC UTILITY HOLDING COMPANIES

Such companies and their
subsidiaries registered under
the Public Utility Holding
Company Act of 1935 exempt
under the provisions of the
Missouri Securities Law.

June 27, 1949

Mr. W. Randall Smart Commissioner of Securities Office of the Secretary of State Capitol Building Jefferson City, Missouri

Dear Sir:

Reference is herewith made to your letter of April 26th, 1949, which reads as follows:

"Section 8260 (d) R. S. Mo. 1939 exempts certain securities from the provisions of the Missouri Securities Law. In describing exempt securities, it reads in part as follows:

'Any security issued or guaranteed, by a corporation owning or operating a railroad or any other public service utility: Provided, that such corporation is subject to regulation or supervision either as to its rates and charges or as to the issue of its own securities by a public commission, board or offices of the government of the United States...'

"The question has arisen as to whether or not public utility corporation's securities are exempt from registration in Missouri for the reason that the company comes under the 'Public Utility Holding Company Act of 1935.' A copy of this act is attached.

"We respectfully request your opinion in this matter."

In answer to our inquiry as to the nature of the specific public utility company which you had in mind when you made your request, we were in receipt of your letter of May 11th, 1949,

June 27, 1949

reading as follows:

"RE: TEXAS ELECTRIC SERVICE COMPANY

"Dear Mr. Crowe:

"In reply to your letter of May 10th, advise the corporation in question is a subsidiary company doing an intrastate business. You have a copy of the prospectus."

The Public Utility Holding Company Act of 1935 (15 U.S.C.A., Section 79 and sequence) provides for the registration and requalition of gas and electric public utility holding companies and their subsidiaries. In Section 1 of that Act Congress sets out the reasons which it believes necessitates the control of such companies and indicates its intent to remedy the evils growing out therefrom by the regulation provided for in the Act. Section 1 of the Act reads as follows:

"Section 1. (a) Public-utility holding companies and their subsidiary companies are affected with a national public interest in that, among other things, (1) their securities are widely marketed and distributed by means of the mails and instrumentalities of interstate commerce and are sold to a large number of investors in different States; (2) their service, sales, construction, and other contracts and arrangements are often made and performed by means of the mails and instrumentalities of interstate commerce; (3) their subsidiary public-utility companies often sell and transport gas and electric energy by the use of means and instrumentalities of interstate commerce; (4) their practices in respect of and control over subsidiary companies often materially affect the interstate commerce in which those companies engage; (5) their activities extending over many States are not susceptible of effective control by any State and make difficult, if not impossible, effective State regulation of public-utility companies.

"(b) Upon the basis of facts disclosed by the reports of the Federal Trade Commission made pursuant to S. Res. 83 (Seventieth Congress, first session), the reports of the Committee on Interstate and Foreign Commerce, House of Representatives, made pursuant to

June 27, 1949

H. Res. 59 (Seventy-second Congress, first session) and H. J. Res. 572 (Seventy-second Congress, second session) and otherwise disclosed and ascertained, it is hereby declared that the national public interest, the interest of investors in the securities of holding companies and their subsidiary companies and affiliates, and the interest of consumers of electric energy, and natural and manufactured gas, are or may be adversely affected--

- "(1) when such investors cannot obtain the information necessary to appraise the financial position or earning power of the issuers, because of the absence of uniform standard accounts; when such securities are issued without the approval or consent of the States having jurisdiction over subsidiary public-utility companies; when such securities are issued upon the basis of fictitious or unsound asset values having no fair relation to the sums invested in or the earning capacity of the properties and upon the basis of paper profits from intercompany transactions, or in anticipation of excessive revenues from subsidiary public-utility companies; when such securities are issued by a subsidiary public-utility company under circumstances which subject such company to the burden of supporting an overcapitalized structure and tend to prevent voluntary rate reductions:
- "(2) when subsidiary public-utility companies are subjected to excessive charges for services, construction work, equipment, and materials, or enter into transactions in which evils result from an absence of arm's-length bargaining or from restraint of free and independent competition; when service, management, construction, and other contracts involve the allocation of charges among subsidiary public utility companies in different States so as to present problems of regulation which cannot be dealt with effectively by the States;
- "(3) when control of subsidiary public-utility companies affects the accounting practices and rate, dividend, and other policies of such companies so as

to complicate and obstruct State regulation of such companies, or when control of such companies is exerted through disproportionately small investment;

- "(4) when the growth and extension of holding companies bears no relation to economy of management and operation or the integration and coordination of related operating properties; or
- "(5) when in any other respect there is lack of economy of management and operation of publicutility companies or lack of efficiency and adequacy of service rendered by such companies, or lack of effective public regulation, or lack of economies in the raising of capital.
- "(c) When abuses of the character above enumerated become persistent and wide-spread the holding company becomes an agency which, unless regulated, is injurious to investors, consumers, and the general public; and it is hereby declared to be the policy of this title, in accordance with which policy all the provisions of this title shall be interpreted, to meet the problems and eliminate the evils as enumerated in this section, connected with public-utility holding companies which are engaged in interstate commerce or in activities which directly affect or burden interstate commerce; and for the purpose of effectuating such policy to compel the simplification of public-utility holding-company systems and the elimination therefrom of properties detrimental to the proper functioning of such systems, and to provide as soon as practicable for the elimination of public-utility holding companies except as otherwise expressly provided in this title."
- Section 2, (7), (A), defines a holding company in the following manner:
 - "(7) 'Holding company' means --
 - "(A) any company which directly or indirectly owns, controls, or holds with power to vote, 10 per

centum or more of the outstanding voting securities of a public-utility company or of a company which is a holding company by virtue of
this clause or clause (B), unless the Commission,
as hereinafter provided, by order declares such
company not to be a holding company; and * * *."

Section 2, (8), (A), defines a subsidiary company as follows:

- "(8) 'Subsidiary company' of a specified holding company means-
- "(A) any company 10 per centum or more of the outstanding voting securities of which are directly or indirectly owned, controlled, or held with power to vote, by such holding company (or by a company that is a subsidiary company of such holding company by virtue of this clause or clause (B)), unless the Commission, as hereinafter provided, by order declares such company not to be a subsidiary company of such holding company; and * * *."

Section 3 of the Act provides that in certain instances the Securities and Exchange Commission of the United States may exempt holding companies and subsidiaries from the provisions of the Act.

Section 4 of the Act provides that holding companies which are not registered with the Securities and Exchange Commission are prohibited from doing certain things. In effect the sum of these prohibited activities is the complete strangulation of holding company operations.

Section 5 provides for the registration of holding companies.

Section 6 provides one of the regulatory provisions contained by the Act. This particular regulation is peculiarly important with regard to this opinion because it deals with the issuance of securities. Section 6, (a), provides as follows:

"Sec. 6. (a) Except in accordance with a declaration effective under section 7 and with the order under such section permitting such declaration to become effective, it shall be unlawful for any registered holding company or subsidiary company thereof, by use of the mails or any means or instrumentality of interstate commerce, or otherwise, directly or indirectly

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(1) to issue or sell any security of such company; or (2) to exercise any privilege or right to alter the priorities, preferences, voting power, or other rights of the holders of an outstanding security of such company."

Section 7, (a), makes provision for the actions prohibited to a registered holding company under the provisions of Section 6, by setting out the method by which the registered companies and their subsidiaries may gain the approval of the Securities and Exchange Commission, thus, complying with the provisions of the Act, after which they may conduct the activities prohibited in Section 6. This section provides that a declaration shall be filed by a company desiring to issue securities. Subsection(c) of Section 7 provides as follows:

- "(c) The Commission shall not permit a declaration regarding the issue or sale of a security to become effective unless it finds that--
- "(1) such security is (A) a common stock having a par value and being without preference as to dividends or distribution over, and having at least equal voting rights with, any outstanding security of the declarant; (B) a bond (i) secured by a first lien on physical property of the declarant, or (ii) secured by an obligation of a subsidiary company of the declarant secured by a first lien on physical property of such subsidiary company, or (111) secured by any other assets of the type and character which the Commission by rules and regulations or order may prescribe as appropriate in the public interest or for the protection of investors; (C) a guaranty of, or assumption of liability on, a security of another company; or (D) a receiver's or trustee's certificate duly authorized by the appropriate court or courts; or
- "(2) such security is to be issued or sold solely (A) for the purpose of refunding, extending, exchanging, or discharging an outstanding security of the declarant and/or a predecessor company thereof or for the purpose of effecting a merger, consolidation, or other reorganization; (B) for the purpose of financing the business of the declarant

as a public-utility company; (C) for the purpose of financing the business of the declarant, when the declarant is neither a holding company nor a public-utility company; and/or (D) for necessary and urgent corporate purposes of the declarant where the requirements of the provisions of paragraph (1) would impose an unreasonable financial burden upon the declarant and are not necessary or appropriate in the public interest or for the protection of investors or consumers; or

"(3) such security is one of the issuance of which was authorized by the company prior to January 1, 1935, and which the Commission by rules and regulations or order authorizes as necessary or appropriate in the public interest or for the protection of investors or consumers."

Subsection (g) of Section 7 provides as follows:

"(g) If a State commission or State securities commission, having jurisdiction over any of the acts enumerated in subsection (a) of section 6, shall inform the Commission, upon request by the Commission for an opinion or otherwise, that State laws applicable to the act in question have not been complied with, the Commission shall not permit a declaration regarding the act in question to become effective until and unless the Commission is satisfied that such compliance has been effected."

Subsection (d) of Section 7 provides as follows:

- "(d) If the requirements of subsections (c) and (g) are satisfied, the Commission shall permit a declaration regarding the issue or sale of a security to become effective unless the Commission finds that--
- "(1) the security is not reasonably adapted to the security structure of the declarant and other companies in the same holding-company system;
- "(2) the security is not reasonably adapted to the earning power of the declarant;

- "(3) financing by the issue and sale of the particular security is not necessary or appropriate to the economical and efficient operation of a business in which the applicant lawfully is engaged or has an interest;
- "(4) the fees, commissions, or other remuneration, to whomsoever paid, directly or indirectly, in connection with the issue, sale, or distribution of the security are not reasonable;
- "(5) in the case of a security that is a guaranty of, or assumption of liability on, a security of another company, the circumstances are such as to constitute the making of such guaranty or the assumption of such liability an improper risk for the declarant; or
- "(6) the terms and conditions of the issue or sale of the security are detrimental to the public interest or the interest of investors or consumers."

From the above provisions of the Public Utility Holding Company Act of 1935, it will be observed that all holding companies, unless exempt by the Securities and Exchange Commission, are subject to regulation regarding the issuance of their securities and they must subject themselves to this regulation in order to carry on business. It will be noted from Section 6 (a) of the Act that the subsidiary companies of such holding companies are also subject to the regulation as to the issuance of their securities.

The constitutionality of the Public Utility Holding Company Act of 1935, in its entirety, has been challenged in several instances. The courts have refused to pass on its entirety but have restricted their holdings in this regard to the specific sections involved in the particular case. It so happens that Sections 6 and 7, relative to the issuance of securities, have not been specifically involved to date. There is, therefore, no specific holding that these sections are constitutional. However, the cases have made no distinction between any of the sections of the Act with regard to constitutionality, and have upheld the congressional power to remedy the evils which brought about the passage of the Public Utility Holding Company Act of 1935.

In Electric Bond and Share Company, et al., v. Securities and Exchange Commission, et al., 303 U.S. 419 (1938), the Supreme Court

of the United States held constitutional Sections 4 and 5 of the Act, which sections provide for the registration of holding companies and the denial of business operations to unregistered companies. In order to show the contentions which were made by counsel and urged upon the court with regard to the constitutionality questioned, we quote the following from the argument for the petitioners, 1. c. 423:

"These sections do not regulate interstate commerce or the use of the mails. The companies which comprise the electric and gas utility industry are not, as such instrumentalities or agents of interstate commerce, nor is their business, as such, interstate commerce. Some of the companies do engage in particular business or transactions which constitute interstate commerce and which may be regulated, but other companies do no such business. This Act predicates the regulation of all alike merely on the holding company relationship and not upon engagement in any business or activities which constitute or affect interstate commerce.

"Nor are the control sections predicated upon or confined to the regulation of activities constituting or directly affecting interstate commerce or the use of the mails. They relate to the issue and sale of securities (Sections 6-7); to the acquisition of assets or securities (Sections 8-10); to sundry corporate and financial transactions (Section 12); to the reorganization or dissolution of holding company systems (Section 11); and to the performance of service, sales and construction contracts (Section 13). In none of these sections is interstate commerce or the use of the mails a condition of the regulation of a particular transaction, nor need the company whose transactions are so regulated be engaged in interstate commerce or activities directly affecting such commerce."

The court in deciding the case stated the following:

" * * The 'electric operations' of subsidiaries in the Bond and Share system are conducted in

thirty-two States. Some operate only within a single State, some in two or more States, transmitting energy across state lines for their own account, and some sell energy at wholesale in interstate commerce."

"We need not go further in the description of the operations of these Companies, as petitioners concede that the carrying out of these service contracts, as found by the trial court, involves continuous and extensive use of the mails and instrumentalities of interstate commerce, although petitioners are careful to qualify the concession by saying that they agree with the trial court that 'this is not to say that the entire business of Ebasco or American Gas constitutes interstate commerce and is therefore subject to unlimited federal regulations."

The petitioners in that case argued that Sections 4 and 5, relating to registration and to submission of documents containing information to the commission were not separable from the other sections of the Act which contained the regulatory provisions of the Act. The Supreme Court refused this contention and ruled that the intent of Congress was that each of the regulatory provisions, as well as Sections 4 and 5, were intended to stand elone, since each of them applied to matters which it was necessary to regulate or to be informed of in order that the evil which Congress was striking at could be remedied. They specifically refused to rule that Sections 4 and 5 could not be separated, and thus upheld those sections as to constitutionality, but refused to rule on the constitutionality of the other sections. This case also sets out the court's reasoning with regard to the congressional purpose for the Act. They ruled that Sections 4, (a), and 5 of the Act were necessary to accomplish the purpose which Congress had intended, and that as such they were constitutional, in the following language:

"Congress has set forth in the Act what it considers to be the factual situation and the need of federal supervision. The following statement is found in paragraph (a) of Section 1:

"'Public-utility holding companies and their subsidiary companies are affected with a national public interest in that, among other things, (1) their securities are widely marketed and distributed by means of the mails and instrumentalities of interstate commerce and are sold to a large number of investors in different States; (2) their service, sales, construction, and other contracts and arrangements are often made and performed by means of the mails and instrumentalities of interstate commerce; (3) their subsidiary publicutility companies often sell and transport gas and electric energy by the use of means and instrumentalities of interstate commerce; (4) their practices in respect of and control over subsidiary companies often materially affect the interstate commerce in which those companies engage; (5) their activities extending over many States are not susceptible of effective control by any State and make difficult, if not impossible, effective State regulation of public-utility companies.

"Congress has further declared in paragraph (b) of that section, upon the basis of facts disclosed by the reports of the Federal Trade Commission and of the Committee on Interstate and Foreign Commerce of the House of Representatives, and otherwise ascertained, the circumstances in which the national interest and the interest of investors and consumers may be adversely affected by the operation of public utility holding companies. And after this catalogue of the abuses which may exist in the circumstances described, Congress declares it to be its policy 'to meet the problems and eliminate the evils as enumerated in this section, connected with public-utility holding companies which are engaged in interstate commerce or in activities which directly affect or burden interstate commerce. Without attempting to state the limits of permissible regulation in the execution of this declared policy, we have no reason to doubt that

from these defendants, with their highly important relation to interstate commerce and the national economy, Congress was entitled to demand the fullest information as to organization, financial structure and all the activities which could have any bearing upon the exercise of congressional authority. The regulation found in Section 5 (b) goes no further than to require this information and we are of the opinion that its validity must be sustained.

"Section 4 (a) prescribes the penalty for failure to register under Section 5, and that section as an incident to registration imposes the duty to file the described registration statement. Treating the requirements of Sections 4 (a) and 5 as a separable part of the Act, the question is whether that penalty may be validly imposed."

" * * * We think that the imposition of such a penalty does not transgress any constitutional provision."

In 1946 the Supreme Court of the United States in North American Company v. Securities and Exchange Commission, 327 U.S. 686 (1946), had before it the question of the constitutionality of Section 11 (b), (1), of the Act authorizing the Securities and Exchange Commission to act to bring about the geographic integration of holding company systems. In this case, as in the Electric Bond & Share Company case, the Electric Bond & Share Company system was involved. The latter company was the pinnacle of the great pyramid of corporations which were primarily engaged in operating gas and utility company properties. Electric Bond & Share controlled several companies which were holding companies in themselves. The latter, in turn, controlled operating subsidiary companies and, again, some of these companies were wholly intrastate companies and others actually did an interstate business. The Securities and Exchange Commission ordered the dissolution of the North American Company, which was a holding company underneath Electric Bond & Share Company, on the ground that North American served no useful purpose. This was done under Section 11 (b) (1) of the Act, and thus was raised the question regarding this section. The Supreme Court went thoroughly into the question of constitutionality. They said the operations of North American were interstate in character, and, as such, it was not unconstitutional for Congress to regulate the operations thereof with the view toward eradicating evils which grow out of such operations. The court said in this regard:

"The interstate character of North American and its subsidiaries is readily apparent from the

Commission's survey of their activities. North American is more than a mere investor in its subsidiaries. See Northern Securities Co. v. United States, 193 U.S. 197, 353-354. the nucleus of a far-flung empire of corporations extending from New York to California and covering seventeen states and the District of Columbia. Its influence and domination permeate the entire system and frequently evidence themselves in affirmative ways. The mails and the instrumentalities of interstate commerce are vital to the functioning of this system. They have more than a casual or incidental relationship. Cf. Ware & Leland v. Mobile County, 209 U.S. 405; Blumenstock Bros. v. Curtis Pub. Co., 252 U.S. 436; Federal Baseball Club v. Na-tional League, 259 U.S. 200. Without them, North American would be unable to float the various security issues of its own or of its subsidiaries, thereby selling securities to residents of every state in the nation. Without them, North American would be unable to exercise and maintain the influence arising from its large stock holdings, receiving notices and reports, sending proxies to stockholders' meetings, collecting dividends and interest, and transmitting whatever instructions and advice may be necessary. Nor could North American maintain its other relationships and contacts with its own subsidiaries without the use of the mails and facilities of interstate commerce. Such interstate commercial transactions involve the very essence of North American's business. See International Textbook Co. v. Pigg, 217 U.S. 91. They enable it 'to promote the sound development' of its investments from its headquarters in New York City. In short, they are commerce which concerns more states than one. Gibbons v. Ogden, 9 Wheat. 1, 194; Second Employers'
Liability Cases, 223 U.S. 1, 46; Minnesota Rate
Cases, 230 U.S. 352, 398. As stated by this
Court in Associated Press v. Labor Board, 301 U.S. 103, 128, Interstate communication of a business nature, whatever the means of such communication is interstate commerce regulable by Congress under the Constitution.

"These requirements of Section 11 (b) (1) apply only to registered holding companies. A holding company, by statutory definition, is a company that controls or possesses a controlling influence over an electric or gas utility company. Section 2 (a) (7). A holding of 10% or more of the outstanding voting securities of such a utility company is presumed to be sufficient to constitute such a relationship, but this presumption may be rebutted by proof before the Commission of a lack of control or controlling influence. Accordingly, a company that is a mere investor in utility securities and that does not control or possess a controlling influence over the utility companies need not comply with Section 11 (b) (1).

"A holding company as so defined must register and hence must obey the commands of Section 11 (b) (1) if it uses the mails or the instrumentalities of interstate commerce directly or through its subsidiaries in the operation of its business. * * *

"By making these enumerated interstate transactions unlawful unless the holding company registers with the Commission and by extending Section 11 (b) (1) to registered holding companies, Congress has effectively applied Section 11 (b) (1) to those holding companies that are in fact in the stream of interstate activity and that affect commerce in more states than one. Congress has further declared in Section 1 (c) that all the provisions of the Act, thus including Section 11 (b) (1), shall be interpreted to meet the problems and remove the evils connected with public utility holding companies 'which are engaged in interstate commerce or in activities which directly affect or burden interstate commerce Section 11 (b) (1) is thus clearly and unmistakably applicable to holding companies engaged in interstate commerce.

"Not all holding companies that are engaged in interstate activities, however, must necessarily

comply with Section 11 (b) (1). By the terms of Section 3 (a) (1), if a holding company and all of its subsidiaries are predominantly intrastate in character and carry on their business substantially in a single state in which such holding company and every subsidiary thereof are organized, the Commission may grant an exemption from any provision of the Act 'unless and except insofar as it finds the exemption detrimental to the public interest or the interest of investors or consumers . . .

" * * This problem, however, is academic so far as North American is concerned. Like most public utility holding companies, North American is engaged in interstate commerce directly end through its subsidiaries. It can lay no claim to a predominantly intrastate character; as to it, Section 3 (a) (1) is wholly inapplicable. * * *

"The crucial constitutional issue, so far as the commerce clause is concerned, resolves itself into the query whether Congress may validly require holding companies engaged in interstate commerce to dispose of their security holdings and to confine their activities in accordance with the standards of Section 11 (b) (1). In urging the negative answer to this query, North American relies upon the settled doctrine that the federal commerce power extends to intrastate activities only where those activities 'so affect interstate commerce, or the exertion of the power of Congress over it, as to make regulation of them appropriate means to the attainment of a legitimate end, the effective execution of the granted power to regulate interstate commerce. United States v. Wrightwood Dairy Co., 315 U.S. 110, 119. See also Santa Gruz Fruit Packing Co., v. Labor Board, 303 U.S. 453, 466; United States v. Darby, 312 U.S. 100, 118-123; Wickard v. Filburn, 317 U.S. 111, 122-124. It is said that the ownership by North American of securities of other system companies is not in itself commerce, interstate or intrastate, and that the right to own or retain property is characteristically governed by state laws, the Federal Government having no concern with such matters except as an incident to the due exercise of one of its granted powers. North American denies that the necessary relationship between the ownership of securities and interstate commerce is self-evident or that it has been found as a fact by Congress, the Commission or any court. The absence of this relationship, it is concluded, causes Section 11 (b) (1) to fall.

"This argument, however, misconceives not only the power of Congress over interstate commerce but also the basic nature of public utility holding companies and the effect that stock ownership has upon their activities. The dominant characteristic of a holding company is the ownership of securities by which it is possible to control or substantially to influence the policies and management of one or more operating companies in a particular field of enterprise. To be sure, other devices may be utilized to effectuate control, such as voting trusts, interlocking directors and officers, the control of proxies, management contracts and the like. But the concentrated ownership of voting securities is the prime method of achieving control, constituting a more fundamental part of holding companies than of other types of business. Public utility holding companies are thereby able to build their gas and electric utility systems, often gerrymandered in such ways as to bear no relation to economy of operation or to effective regulation. The control arising from this ownership of securities also allows such holding companies to exact unreasonable fees, commissions and other charges from their subsidiaries, to make undue profits from the handling of the issue, sale and exchange of securities for their subsidiaries, to issue unsound securities of their own based upon the inflated value of the subsidiaries, and to affect adversely the accounting practices and the rate and dividend policies of the subsidiaries. See Section 1 (b). Congress

has found that all of these various abuses and evils occur and are spread and perpetuated through the mails and the channels of interstate commerce. And Congress has further found that such interstate activities, which grow out of the ownership of securities of operating companies, have caused public utility holding companies to be 'affected with a national public interest.' Section 1 (a).

* * * * * * * * * * * * * * * * * * *

"The constitutionality of Section 11 (b) (1) under the commerce clause thus becomes apparent. For nearly one hundred and twenty-five years, this Court has recognized that the power of Congress over interstate commerce is 'the power to regulate; that is, to prescribe the rule by which commerce is to be governed. This power, like all others vested in Congress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the constitution. Gibbons v. Ogden, supra, 196. This is not to say, of course, that Congress is an absolute sovereign. It is limited by express provisions in other parts of the Constitution, such as Section 9 of Article 1 and the Bill of Rights. But so far as the commerce clause alone is concerned Congress has plenary power, a power which textends to every part of interstate commerce, and to every instrumentality or agency by which it is carried on; and the full control by Congress of the subjects committed to its regulation is not to be denied or thwarted by the commingling of interstate and intrastate operations. ' Minnesota Rate Cases, supra, 399."

On the same reasoning and principles as set out in the above case, the Supreme Court of the United States in American Power and Light Company v. Securities and Exchange Commission, 329 U.S. 90 (1946), upheld the constitutionality of Section 11 (b) (2). The court in that case said at 1.c. 97:

"Like Section 11 (b) (1), its statutory companion, Section 11 (b) (2) applies only to registered holding companies and their subsidiaries. * * *

(Underscoring ours.)

In discussing the interstate character which brought the company under the regulation of the holding company Act the court said:

> "The Bond and Share system, including American and Electric, possesses an undeniable interstate character which makes it properly subject, from the statutory standpoint, to the provisions of Section 11 (b) (2). This wast system embraces utility properties in no fewer than 32 states, from New Jersey to Oregon and from Minnesota to Florida, as well as in 12 foreign countries. Bond and Share dominates and controls this system from its headquarters in New York City. As was the situation in the North American case, the proper control and functioning of such an extensive multi-state network of corporations necessitates continuous and substantial use of the mails and the instrumentalities of interstate commerce. Only in that way can Bond and Share, or its subholding companies or service subsidiary, market and distribute securities, control and influence the various operating companies, negotiate inter-system loans, acquire or exchange property, perform service contracts, or reap the benefits of stock ownership. See Section 1 (a). See also International Textbook Co. v. Pigg. 217 U.S. 91. Moreover, many of the operating companies on the lower echelon sell and transmit electric energy or gas in interstate commerce to an extent that cannot be described as spasmodic or insignificant. Electric Bond & Share Co. v. S.E.C., supra, 432-33. Such activities serve to augment the interstate nature of the Bond and Share system. And they make even plainer the fact that this system falls within the intended scope of Section 11 (b) (2)."

Other cases have upheld the constitutionality of Sections of the Act. Section 11 has been upheld by the Federal Circuit Courts (United Gas and Improvement Company v. Securities and Exchange Commission, 138 Fed. (2d) 1010 (1943); American Power and Light Company v. Securities and Exchange Commission, 141 Fed. (2d) 606 (1944); North American Company v. the Securities and Exchange Commission, 133 Fed. (2d) 148 (1943)). Section 12 (h) has been upheld (Egan v. the United States, 137 Fed. (2d) 369 (1943)).

With regard to subsidiary companies, the courts have held that when a subsidiary company is a member of a holding company system, that is, is a subsidiary under the terms of the Act to a holding company, the subsidiary company is subject to regulation under the Act when the parent holding company is a registered holding company under the Act. The Eighth Circuit Court of Appeals held in Panhandle Eastern Pipeline Company v. Securities and Exchange Commission, 170 Fed. (2d) 453 (1948), that intrastate subsidiaries were subject to regulations under the Act when the holding company was a registered holding company, but no constitutional question was raised. In Detroit Edison Company v. Securities and Exchange Commission, 119 Fed. (2d) 730 (1941), the Sixth Circuit Court of Appeals held a subsidiary which did only intrastate business was subject to regulation under Sections 24 (a) and 2 (a) (8) of the Act, even though it was contended in that case that Congress lacked the power to regulate it because the activities were purely intrastate. The court did not pass on the constitutionality but said that the registration of the parent holding company was prima facie evidence that the subsidiary was subject to the provisions of the Act. The same holding was made in Hartford Gas Company v. Securities and Exchange Commission, 192 Fed. (2d) 794 (1942). Here again the petitioner was a subsidiary company operating wholly within one state.

Sections 6 and 7, the sections with which we are primarily interested in this opinion, were involved in the holding in Okin v. Securities and Exchange Commission, 154 Fed. (2d) 27 (1946). The petitioner in that case sought a review of orders of the Securities and Exchange Commission which affected the issuance of securities by American and Foreign Power Company, a Maine corporation and subsidiary of Electric Bond and Share Company, the former not operating directly or indirectly any public utility within the United States and deriving its income from utility operations of subsidiary companies operating solely in foreign companies. The court in that case said:

"(1) Foreign Power is a Maine corporation, many of whose securities are held by American investors. It is a subsidiary of Bond and Share, which has registered as a holding company under the Act. Foreign Power does not operate directly or indirectly any public utility within the United States, and its income from utility operations is derived solely from subsidiary companies operating in foreign countries. Because of these facts the

petitioner argues that the Public Utility Holding Company Act of 1935 does not give the Commission jurisdiction to regulate any of Foreign Power's affairs. We cannot agree with this contention. Foreign Power is within the literal definitions of 'holding company' and 'subsidiary company, set forth in sections 2(a) (7) and 2(a) (8), 15 U.S.C.A. Section 79b(a) (7,8) respectively, neither of which contains any geographical limitation. Under section 3(a) (5), 15 U.S.C.A. Section 79c (a) (5), the Commission is directed to exempt by rule or order a holding company from any provision or provisions of the Act 'unless and except insofar as it finds the exemption detrimental to the public interest or the interest of investors * * * if-- * * * (5) such holding company is not, and derives no material part of its income, directly or indirectly, from any one or more subsidiary companies which are, a company or companies the principal business of which within the United States is that of a public-utility company. A similar provision for the exemption of a subsidiary company of a holding company is found in section 3(b). The discretion which sections 3(a) (5) and 3(b) confer upon the Commission to consider the public interest and the interest of investors in determining the extent of the exemption to be granted to a company such as Foreign Power would be meaningless, if the definitions of 'holding company' and 'subsidiary' were to be so limited as ipso facto to make the Act inapplicable to such a company. Consequently, in our opinion, the Commission had power to rule, as it did in 6 S. E. C. 396, that Foreign Power was entitled to only partial exemption from regulation under the Act. We do not understand the petitioner to argue, nor could he successfully do so, that the partial exemption granted Foreign Power was broad enough to exempt it from the provisions upon which the Commission relied in making the orders now under review.

"(3) In support of its power to make the orders under review the Commission refers to numerous sections of the Act, and particularly to 6(a), 7(d)

and (f), and 12 (c) and (f) 15 U.S.C.A. Sections 79f(a), 79g(d,f), 791(c,f). Section 6(a) provides that, except in accordance with a declaration effective under section 7, no 'registered holding company or subsidiary company thereof' shall 'issue or sell any security of such company. The notes which Foreign Power proposed to issue in renewal of its debt to its parent were a 'security' within the definition of section 2(a) (16). Under section 7(d) the Commission had to consider whether 'the terms and conditions' of the proposed issue were 'detrimental to the public interest or the interest of investors!; and under section 7(f) its order permitting the proposal to become effective could contain 'such terms and conditions as the Commission finds necessary to assure compliance with the conditions specified in this section.' Section 12(c) declares it unlawful for a subsidiary company of a registered holding company to 'retire, or redeem any security of such company, in contravention of such rules and regulations or orders as the Commission deems necessary or appropriate to protect the financial integrity of companies in holding-company systems. Also apparently applicable are the provisions of section 12(f) which make it 'unlawful for any registered holding company or subsidiary company thereof' to enter into or perform 'any transaction not otherwise unlawful under this title, with any company in the same holding-company system * * in contravention of such rules and regulations or orders * * * as the Commission deems necessary or appropriate in the public interest or for the protection of investors * * * or to prevent the circumvention of the provisions of this title or the rules and regulations thereunder. The foregoing sections are broad enough in terms to empower the Commission in its order approving issuance of the renewal notes to impose conditions designed to preserve the status quo pending a later determination of the rank and status of the debt claim of Bond and Share against its subsidiary; and the purpose of the Act supports the same construction. * * *

It thus appears that in the above case the Federal Circuit Court assumed the constitutionality of Sections 6 and 7.

From the above authorities, we are of the opinion that holding companies, not exempt by the Securities and Exchange Commission, are required to register with the commission under and according to the provisions of the Public Utility Holding Company Act of 1935, that they must do so whether their subsidiery companies are doing intrastate or interstate business and operations, that a holding company registered or required to be registered under the terms of the Act is subject to the regulation under the Act, that a subsidiary of such holding company is also subject to regulation under the provisions of the Act, and that this regulation extends to the issuance of securities to the holding companies and their subsidiaries, since the same reasons for upholding the regulations and provisions of the Act in the case of other sections of that Act apply with equal force to Sections 6 (a) and 7, which deal with the issuance of securities by holding companies and their subsidiaries.

Only one case would seem to be in variance with the conclusions stated immediately above. This is North American Company v. Securities and Exchange Commission, 81 Fed. (2d) 461 (1936), in which the Federal Circuit Court held that a holding company which was in bankruptcy did not have to register under the Public Utility Holding Company Act of 1935, before going forward with a reorganization plan, because all of its subsidiaries were entirely intrastate in character. This was an early case and we think that the decisions of the United States Supreme Court following that case, as well as the other federal decisions, have overruled it. We believe this conclusion is inescapable because it seems obvious that the same evils at which Congress was striking when it passed the Public Utility Holding Company Act of 1935 would be in evidence with relation to a holding company which held subsidiaries which were all intrastate companies as well as to a holding company which held subsidiaries doing interstate business. The courts held that Congress had the right to eradicate the evils against which the 1935 Act was directed. The evils are the manipulation of the subsidiaries by the holding company and the only way to remedy these evils is to regulate the holding companies and the subsidiaries, and this is true whether the subsidiary is intrastate, interstate, or a combination of both, with regard to its operations. We think this conclusion is further substantiated by the fact that the Supreme Court of the United States in the cases which we have quoted above, upheld the constitutionality of provisions of the Act on the reasoning which we have set out in the above sentences of this paragraph (and quoted from the cases) in the face of the facts in some of the cases showing that some of the subsidiaries of the holding companies involved were intrastate in character. It would appear that, if the Supreme Court of the United States was not completely opposed to the theory set

out in this Federal case, it not only would not have ruled on the basis of the reasoning which it used, but it would have been compelled to distinguish between the subsidiaries of these holding companies involved, and to say that, where the subsidiary was intrastate in character, the provisions of the Holding Company Act of 1935 did not apply to it. The Supreme Court, however, did not make such a distinction.

In our opinion, therefore, a Public Utility Holding Company and its subsidiaries, of the type described in your letters relating to the request for this opinion, would be required to register under the Public Utility Holding Company Act of 1935, and that the holding company and its subsidiaries would be subject to the regulations under the Act, including the approval of the issuance of its securities.

One more question remains, however. This is whether or not, assuming that the company here in question is subject to regulation under the Public Utility Holding Company Act of 1935, the regulation therein contained is that which is contemplated by the Missouri Statutes regarding the regulation of securities and their sale in Missouri. This is important, because, if this were not true, we do not think such congressional regulation would bring the company within the meaning of the exemption clause in the Missouri Statutes which you set out in your letter. However, the above quoted provisions of the Public Utility Holding Company Act of 1935 and the quotations from the Federal cases, show that the purpose in the Federal regulation of the issuance of securities is to protect the investor in such securities. While the question of the prevention of monopoly is the primary consideration of the Act of 1935, it is necessary for the issuance of securities to be regulated in order that monopoly be restricted and the reason that monopoly is to be restricted and regulated is for the protection of the investor in securities.

We quote from Section 8264, R. S. Missouri 1939:

"If upon examination of any application the commissioner shall find that the sale of security referred to therein would not be fraudulent or would
not work or tend to work a fraud upon the purchaser,
or that the enterprise or business of the issuer
is not based upon unsound business principles, then
upon the payment of the fee provided in this section,
he shall record the registration of such security
in the register of securities, and thereupon such

security so registered may be sold by the issuer or by any registered dealer who has notified the commissioner of his intentions so to do, in the manner hereinafter provided in section 8279, subject, however, to the further order of the commissioner as hereinafter provided."

As will be seen from the above quoted paragraph, the protection of the investor in securities is the purpose for the regulation of the sale of securities in Missouri under the Missouri Statutes. It seems clear, therefore, that the purpose of the regulation by the Missouri Statutes and the purpose for the regulation under the Public Utility Holding Company Act of 1935 is the same. We are of the opinion, therefore, that if a public utility gas and electric holding company and its subsidiaries are subject to the regulation under the Public Utility Holding Company Act of 1935, the protection of the investor is provided for as if the company was registered under the Missouri Statutes and subject to the regulations of those statutes.

In expressing the opinions above, we make these reservations. Our conclusions above would not necessarily be true where the securities involved are not of a type which may be regulated under the provisions of the Public Utility Holding Company Act of 1935. We do not quote those provisions here, but refer the department to the Act in this regard. The opinions which we express here also do not apply where the Securities and Exchange Commission has, under the provisions of the Act of 1935, exempted any gas and electric public utility company from the provisions of the Act of 1935. We are also assuming in this opinion that the statements in the prospectus of the Texas Electric Service Company, to the effect that that company is a subsidiary of a holding company registered under the Public Utility Holding Company Act of 1935, is correct.

CONCLUSION.

It is, therefore, the opinion of this department subject to the reservations contained in this opinion, that the securities of the Texas Electric Service Company, a subsidiary of a Public Utility Holding Company registered under the Public Utility Holding Company Act of 1935, are exempt securities from the provisions of the Missouri Security Law, in accordance with the terms of Section 8260 (d), R. S. Missouri 1939.

Respectfully submitted,

SMITH N. CROWE, JR. Assistant Attorney General

APPROVED:

J. E. TAYLOR Attorney General SNC/few REFERENDUM: ELECTIONS:

Special election for referendum vote on bills which passed in the 65th General Assembly and for which referendum petitions have been presented may be ordered.

September 27, 1949

FILED 83

Honorable Forrest Smith Governor of Missouri Jefferson City, Missouri

Dear Sir:

This is in answer to your letter of recent date requesting an official opinion of this department, and reading as follows:

"I would like to have an opinion from your department as to whether the Legislature will have the authority to call a special election to vote on House Committee Substitute for House Bill No. 185, if sufficient referendum petitions are filed with the Secretary of State within the proper time.

"I am informed that the petitions currently being circulated, calling for a referendum election on House Committee Substitute for House Bill No. 185, provide that such referendum election is to be held at the state election, November 7, 1950."

Section 52(b) of Article III of the Constitution of Missouri, 1945, provides, in part, as follows:

" * * All elections on measures referred to the people shall be had at the general state elections, except when the general assembly shall order a special election. Any measure referred to the people shall take effect when approved by a majority of the votes cast thereon, and not otherwise. * * * *

It is to be noted that the quoted portion of Section 52(b) of Article III of the Constitution provides that the General Assembly shall have power to order a special election on measures referred to the people. In the case of Libby vs. Olcott, 134 Pac. 13, the Supreme Court of Oregon

en banc, in a case where an action was brought against the Secretary of State of Oregon to prevent the Secretary from proceeding with his duties in connection with a special election where measures referred to the people were to be voted upon, said, 1.c. 14 and 15:

"By the act of February 28, 1913 (Laws 1913, p. 620), the legislative assembly passed a law providing that 'there shall be held a special election in the several voting precincts of this state on the first Tuesday after the first Monday in November, 1913. All measures passed by the twenty-seventh legislative assembly of the state of Oregon upon which the referendum may be invoked shall be submitted to the people for their approval or rejection at such special election. In substance, the act in general terms made the present law for general elections applicable to that election, provided for filing arguments for or against the laws referred, printing the official pamphlet relating thereto, and mailing the same, together with an appropriation for \$12,000 to carry the act into effect, and declared an emergency. * * * *

* * * * * * * * *

"The plaintiff's first reason for his opposition is that the election is ordered without stating upon what measures the vote will be taken, and because no petitions for the reference of laws to the people were pending at the passage of the act. To the first reason the second is closely allied. It is that the electorate is to be called upon to approve or reject only laws passed at the 1913 session of the legislative assembly. He argues that before the referendum can be directed, there must be some valid enactment in being that may be the subject of that prerogative of the people. It may be noted that both of the acts specifically mentioned in the complaint, and against which referendum petitions are alleged to have been filed, were passed before the law assailed in this suit.

Immediately upon their enactment they became proper subjects for the exercise of the referendum, subject to the condition that the petition against them be filed with the Secretary of State not later than 90 days after the final adjournment of the Legislature adopting the measure. We are not informed by the complaint that any other measure attacked by the referendum was not passed prior to the act in question. Construing the pleading against the pleader, we presume there is none. It is plain, therefore, that there was then in existence material upon which the referendum might operate. The act clearly designates them, not as laws thereafter to be passed, but in the words fall measures passed by the twenty-seventh legislative assembly of the state of Oregon upon which the referendum may be invoked. * * * * Summing up then as to the first two objections, we hold that the act sufficiently states the measures upon which a vote will be so taken, that there was then actual material in existence subject to the referendum, and that it was competent for the Legislature to provide for the referendum of its own measures only. # # # # #

"According to the complaint, the head and front of the Legislature's offending is that it has called a special election for the decision of possible referendums. The essence of the controversy rests in the right or wrong of that action as determined by the standards of the Constitution. properly brings us to a consideration of the plaintiff's third and principal objec-It is, in substance, that the act diminishes and attempts to pervert and destroy the referendum power reserved to the people. Section 1, art. 4, of the Constitution declares in part as follows: The legislative authority of the state shall be vested in a legislative assembly, consisting of a Senate and House of Representatives, but the people reserve to themselves power to propose laws and amendments to the Constitution and to enact or reject the same at the polls, independent of the legislative assembly, and also reserve power at their own option to approve or

reject at the polls any act of the legislative assembly. * * * The second power is the referendum, and it may be ordered, * * * either by the petition signed by five per cent. of the legal voters, or by the legislative assembly, as other bills are enacted. Referendum petitions shall be filed with the Secretary of State not more than ninety days after the final adjournment of the session of the legislative assembly which passed the bill on which the referendum is demanded. The veto power of the Governor shall not extend to measures referred to the people. All elections on measures referred to the people of the state shall be had at the biennial regular general elections, except when the legislative assembly shall order a special election. * * * * In this section the people have declared their will on the subject in hand. By it they have vested legislative authority primarily in the legislative assembly with the reservations noted. Given a referendum ordered by the petition of voters, or by an act of the Legislature passed as other bills are enacted, the people saw fit to make a declaration about when such a question should be decided. On this point they said that 'all elections on measures referred to the people of the state shall be had at the biennial regular general elections, except when the legislative assembly shall order a special election. This language must be construed as part of the general scheme outlined in that section of the onstitution. It qualifies the reservation of power by the people which they call the referendum. To the legislative assembly they have committed the authority to call special referendum elections. Whether it fetters or facilitates the exercise of that reserved prerogative does not concern us. It exists. It is the voice of the people themselves which we must heed, and to which we must give effect. What is the essence of the referendum? It is the right to approve or reject at the polls any act of the legislative assembly. The people themselves

have shortened the period within which its exercise may be invoked to 90 days after the final adjournment of the session of the Legislature at which the contested measure was enacted. The law in question does not purport to disturb this element of the people's power. Neither does it in the least essay to abridge the right of any legal voter to approve or reject any measure referred. The right to appoint a special election might properly be ascribed to the legislative authority vested primarily by the people in the legislative assembly; but the people have gone further, and in almost express terms have given their representatives permission to call such elections."

At present, House Bill No. 185 has been enacted. Therefore, under the holding in the Olcott case, supra, a special election at which such law may be referred can be validly enacted. While it is true that in the case of State ex rel. vs. Becker, 289 Mo. 660, the Supreme Court of Missouri rejected the holding of the Supreme Court of Oregon, insofar as the conclusiveness of an emergency clause in a law was concerned, we believe that the holding of the Supreme Court of Oregon is entitled to great weight and is persuasive in this matter. Since the quoted portion of Section 52(b) of Article III of the Missouri Constitution was taken from the Oregon referendum provision, the only difference in the two provisions is that where the Missouri statute provides "general state elections," the Oregon section (Article 4, Section 1) provides "biennial regular general elections."

In the case of State ex rel. vs. Hall, 197 N.W. 687, the Supreme Court of North Dakota said, in an action against the Secretary of State to restrain such Secretary from submitting to the electors certain legislative measures, at 1.c. 688:

"The facts necessary to be stated are: The last Legislative Assembly enacted chapter 204, S.L. 1923, relating to partisan elections, chapter 205, Laws 1923, relating to nonpartisan elections, chapter 208, Laws 1923, relating to a party central committee, and section 2 of chapter 300, Laws 1923, relating to bank stock taxes. Each of these acts was adopted without any emergency clause. On May 31, 1923, and before these acts became

effective as laws, referendum petitions signed by more than 7,000 electors of the state were filed for the purpose of referring these acts to a vote of the electors. The referendum petitions designated the general election to be held on the 4th of November, 1924, as the date of the referendum election for such laws. On January 30, 1924, the Governor called a special election for the purpose of submitting to the voters of the state the legislative acts thus made subject to the referendum petitions, to be held on March 18, 1924. This date is the date for holding the presidential preference primary election. Under article 26 of the Constitution, as adopted by the people in 1918, and ratified by the Legislature in 1919 (see Laws 1919, p. 503), the power of the people to cause a referendum of legislative acts for the vote of the electorate is specifically reserved. This article permits 7,000 electors at large, by referendum petitions, to suspend the operation of any measure enacted by the Legislature, except an emergency measure. It provides that each measure--

"'referred to the electors, shall be submitted by its ballot title, which shall be
placed upon the ballot by the Secretary
of State and shall be voted upon at any
state-wide election designated in the
petition, or at any special election called
by the Governor.' (The italics are ours.)

"Further, this article provides:

"If a referendum petition is filed against an emergency petition, such measure shall be a law until voted upon by the electors. And if it is then rejected by a majority of the votes cast thereon, it shall be thereby repealed. Any such measure shall be submitted to the electors at a special election if so ordered by the Governor or if the referendum petition filed against it shall be signed by thirty thousand electors at large. Such

special election shall be called by the Governor and shall be held not less than one hundred nor more than one hundred thirty days after the adjournment of the session of the Legislature.

"In substance, the petitioner contends that the Governor has no power to call a special election upon acts, not emergency acts, made subject to referendum petitions when petitioning electors have designated in the referendum petitions a particular time for submission of the acts at a state-wide election; that the Governor has the power to call a special election only upon referendum petitions that affect emergency measures concerning which special authority is granted and special duties are imposed upon him.

"On the oral argument it was urged that, if the Governor, regardless of the date selected by the referendum petitions, possessed this independent power to call a special election upon acts not emergency measures, he might practically annul the constitutional provision by postponing the time of a special election after the time designated by the petitioning electors, and, besides, might wholly defeat or abrogate the power granted to the petitioning electors to fix the time for holding a state-wide election upon acts so referred.

"The precise question presented upon this appeal is whether the Governor has the power, pursuant to the constitutional provisions quoted, to call a special election in advance of the time designated by petitioning electors in referendum petitions. In answering this question, we are clearly of the opinion that the language of the constitutional provisions and intent thereof, considered in connection with the cognate law, contemplated and gave the power to petitioning electors to designate in referendum petitions a time when referred acts, not emergency measures, might be submitted to the electors at any state-wide election, and also gave to the Governor the power to accelerate the time of holding an election

upon such referred measures by calling a special election. These alternative powers so granted to the petitioning electors and to the Governor are consistent with the fundamental theory of checks and balances, and act as checks one upon the other, so that the petitioning electors, if they so desire, may fix the time beyond which such election may not be deferred, and, on the other hand, so that the Governor, if in his judgment the exigencies of the situation so require, may accelerate the time designated by calling a special election."

It is obvious that the special election ordered by the Legislature has no effect upon any act which is referred to the people by sufficient petitions, but has the effect only of accelerating the time when the people may approve or reject such act. There can be no vested right acquired in the time a referendum election is to be held, the only effect of the filing of the referendum petitions being to suspend the operation of the law until such time as the people may exercise their right to adopt or reject the law.

CONCLUSION

It is the opinion of this department that under the provisions of Section 52(b) of Article III of the Constitution of Missouri, 1945, the General Assembly has the power to order a special election at which House Bill No. 185 of the 65th General Assembly may be referred to vote of the people if sufficient referendum petitions are filed with the Secretary of State within the time limit set by the Constitution.

Respectfully submitted,

APPROVED:

C. B. EURNS, JR. Assistant Attorney General

J. E. TAYLOR Attorney General

CBB:VLM

TAXATION:

H.C.S.H.B. 185, 65th G.A., still permits refunds for motor fuel sold for non-highway use.

October 10, 1949

Honorable Forrest Smith Governor of Missouri Jefferson City, Missouri



Dear Governor Smith:

We have received your request for an opinion of this Department, which is as follows:

"Will you please furnish me with an official opinion on the question of whether or not non-highway users of motor vehicle fuels will be entitled to a refund of the taxes paid under House Committee Substitute for House Bill No. 185, as passed by the 65th General Assembly."

Section 3 of H.C.S.H.B. No. 185 of the Sixty-fifth General Assembly, omitting sub-paragraphs (g) and (h), not here relevant, reads as follows:

"Section 3. (a) In order to provide funds for the construction and maintenance of the public highways of this state and to pay the principal and interest on the road bonds of the state there is hereby provided for a license tax to produce a sum equal to four cents (4¢) on each gallon of motor fuel used in propelling motor vehicles upon the public highways of Missouri to be collected as hereinafter provided.

"(b) For the privilege of receiving motor fuel, there is hereby imposed upon every person receiving fuel in this state, a license tax equal to four cents (4¢) per gallon on all motor fuel received to be sold for use in propelling motor vehicles upon the public highways of this state. It shall be presumed that

all motor fuel received in this state is to be sold for use and will be used in propelling motor vehicles upon the public highways.

- "(c) The distributor receiving motor fuel in this state shall be liable for said license tax on the gross number of gallons of fuel received by him as shown by invoices thereof less deductions in this act provided for, and shall pay said license tax to the administrator.
- "(d) Every distributor who shall receive motor fuel in this state, shall, except as otherwise provided herein, upon selling such fuel, add to the selling price of each and every gallon of such fuel the per gallon amount of said tax and collect the same from the purchaser thereof. Thereafter, except as otherwise provided herein, if said fuel is again sold the per gallon amount of the tax shall be added to the selling price of the fuel by any person who shall sell the same, and shall be collected from the purchaser, and so on, so that the ultimate consumer, shall bear the burden of the tax as a part of the price of the fuel he purchases.
- "(e) Every person purchasing motor fuel in this state from any distributor or other person, shall pay, except as otherwise provided herein, to the distributor or other person from whom said fuel is purchased, the amount of the license tax which the distributor or other person is required by this act to add to the selling price of the motor fuel. It shall be presumed that all fuel purchased by any person in this state is intended to be used and will be used to propel motor vehicles upon the public highways of this state.
- "(f) No tax shall be imposed, charged or collected with respect to the following:
 (1) Motor fuel exported or sold for export

from this state to any other state, territory, or foreign country, except in the usual and ordinary fuel supply tank connected with the engine of a motor vehicle leaving this state.

- "(2) Motor fuel received by any licensed distributor and thereafter lost or destroyed while such distributor is the owner thereof as a result of theft, leakage, fire, accident, explosion, lightning, flood, storm, act of war, or public enemy, or other like cause.
- "(3) Sales or exchanges of motor fuels between licensed distributors, as provided in the second sentence of Section 3(g)."

(Emphasis ours.)

When originally passed by the House of Representatives, Section 3(b) reads as follows:

"For the privilege of receiving motor fuel to be sold for use in propelling motor vehicles upon the public highways of this state, there is hereby imposed upon every person receiving fuel in this state, a license tax equal to four cents (4¢) per gallon on all motor fuel received to be sold for use in propelling motor vehicles upon the public highways of this state. It shall be presumed that all motor fuel received in this state is to be sold for use and will be used in propelling motor vehicles upon the public highways."

(Emphasis ours.)

Section 3(f) also contained the following additional exemptions:

"(2). Motor fuel sold to the United States of America or any agency or instrumentality thereof, or to the state, to any of the political subdivisions of the state or to any municipality in the state.

- "(3). Motor fuel sold to any post exchange or concessionaire on any Federal reservation within this state; but the tax on motor fuel so sold, to the extent permitted by Federal law, shall be paid to the state by such post exchange or concessionaire.
- "(4). Motor fuel sold to any person for use in the performance of any such person's cost-plusa-fixed-fee or fixed percentage contract with the United States, or cost-plus-a-fixed-fee or fixed percentage contract under such contract, for the construction, manufacture or operation of the United States Government defense projects connected with the prosecution of any war declared by Congress.
- "(5). Motor fuel used by any licensed distributor for any purposes other than the generation of power for the propulsion of motor vehicles upon the public highways."

(Emphasis ours.)

These provisions of sections 3(b) and 3(f), as originally passed by the House of Representatives, are identical with those found in the corresponding sections of the 1943 Motor Fuel Tax Law (Laws of 1943, p. 670), except for the change in the amount of the tax and for the addition in section 3(f) (2) of an exemption applicable to motor fuel sold to the state or to any political subdivision or municipality in the state.

Senate Substitute Amendment No. 1 eliminated the words "to be sold for use in propelling motor vehicles upon the public highways of this state", where they first appeared in the House version of that section and also eliminated exemption paragraphs numbered 2,3,4, and 5, in section 3(f) of the House version. Senate Journal, 65th General Assembly, June 29, 1949, p. 1231.

No change whatsoever was proposed or made in section 17 of the 1943 act, <u>supra</u>, which section provides for refund of tax paid on fuel bought for other than highway use, as follows:

"All motor fuels distributed or sold in this state by any person shall be presumed to have been sold for use in propelling motor vehicles upon the public highways of this state; provided, however, that any person who shall buy and use

motor fuel for any purpose whatever, except in the operation of motor vehicles upon the highways of this state, who shall have paid or have had charged to his account the license tax required by this act to be paid, either directly or indirectly through the amount of such tax being included in the price of the fuel, shall be reimbursed and repaid the amount of said tax, upon presenting a claim therefor to the administrator.

"The claim to the administrator shall be in the form of an affidavit, stating the purpose for which said fuel was used, and shall be supported by the original sales slip or invoice covering the purchase of said fuel. The term, 'original sales slip or invoice,' as used herein, shall mean the top copy and not any duplicate original or carbon copy of the invoice or sales slip. The original sales slip or invoice must bear the following legend; 'This is customer's invoice,' or some similar legend, and shall in addition contain the following information: (1) date of sales, (2) name and address of purchaser (which must be the name of the claimant), (3) name and address of seller, (4) number of gallons purchased and price per gallon, (5) Missouri motor fuel tax, as a separate item.

"The forms upon which claims are to be made shall be prescribed by the administrator, and he shall keep the clerks of the County Courts and the Comptroller of the City of St. Louis supplied with quantities of said forms.

"No claim for refund of motor fuel tax under this section shall be allowed unless the supporting original invoice or sales slip indicates on its face that the purchaser at the time of purchase declared to the seller of said motor fuel his intention to use the motor fuel thus purchased for purposes other than the propelling of motor vehicles upon the public highways of this state, and declared his intention to claim a refund of the tax paid as a part of the purchase price of said fuel. As evidence of this declaration of intention, the seller of said fuel shall, at

the time of the sale, indicate, by stamp or otherwise, on the face of the original invoice or sales slip, a certification that such declaration of intention was made. Said certification shall be in substantially the following form:

"'The undersigned, as agent for....., the seller, hereby certifies that the purchaser of the motor fuel invoices hereon at the time of purchase expressly declared it as his intention to use such motor fuel for a purpose other than propelling motor vehicles upon the public highways of this state, and declared his intention to file a claim for refund of the tax included in the purchase price.

Agent for Seller.'

"All applications for refunds under this section must be filed with the administrator within one hundred twenty (120) days of the date of purchase, as shown on the original invoice or sales slip. Upon the receipt of such affidavit and invoice or sales slip, the administrator, upon approving the same, shall cause the amount of the tax that such claimant paid to be refunded by a requisition upon the State Auditor, supported by said claim, for a warrant upon the State Treasurer, payable to said claimant. Said warrant shall be paid by the Treasurer out of any funds appropriated by the Legislature for said purpose."

Therefore, determination of your question depends upon the effect of the elimination from Section 3(b) of the words "to be sold for use in propelling motor vehicles upon the public highways of this state," where those words first appeared in that section of the 1943 act and also in the original House version of the act here under consideration.

As pointed out above, no change was made in section 17, which provides for refunds upon purchasers of gasoline not purchased for use in propelling vehicles upon the state highways. Furthermore, Section 3(a) provides that a tax is provided to produce a sum equal to four cents per gallon of "motor fuel used in propelling motor

vehicles upon the public highways of Missouri to be collected as hereinafter provided." Section 3(b) provides that the tax is imposed "on all motor fuel received to be sold for use in propelling motor vehicles upon the public highways of this state."

None of the exemptions which were eliminated by Senate Amendment No. 1 from Section 3(f) referred to non-highway use, except sub-paragraph (5), set out above. That provision was, however, applicable only to licensed distributors, and it can hardly be claimed that its elimination evidences any intention on the part of the Legislature to eliminate refunds for non-highway use generally.

Of course, the primary guide in the construction of statutes is the intention of the Legislature. However, such intention must be found in the words used, if possible. Haynes v. Unemployment Compensation Commission, 353 Mo. 540, 183 S.W. (2d) 77. Here, the only matter from which any intention on the part of the Legislature to eliminate refunds for non-highway use of motor fuel may be deduced is the striking out of the words "to be sold for use in propelling motor vehicles upon the public highways of this state" in the first part of Section 3(b), supra. However, the provisions which remained after that was done still indicate clearly that the tax is intended to apply only on fuel sold for use in propelling vehicles on the highways. The act by its terms still expressly so provides in Sections 3(a) and 3(b), quoted above.

Furthermore, no action was taken concerning Section 17 of the 1943 Act, which provides for refunds for non-highway use. "The law does not favor repeals by implication. If by any fair interpretation all the sections of a statute can stand together, there is no repeal by implication." State v. Bader, 336 Mo. 259, 78 S.W. (2d) 835, 1.c. 839. In view of the provisions remaining in Section 3 providing that the tax is imposed upon the sales of fuel to be used in propelling motor vehicles on the highways, we do not see how it may be urged that Section 17 has been repealed by implication.

CONCLUSION

Therefore, this Department is of the opinion that H.C.S.H.B. No. 185 of the Sixty-fifth General Assembly did not eliminate

refunds of motor fuel taxes on motor fuel purchased for other than use in propelling motor vehicles on the public highways of this state.

Respectfully submitted,

ROBERT R. WELBORN Assistant Attorney General

APPROVED:

J. E. TAYLOR Attorney General SEC'Y OF STATE: NAMES:

FICTITIOUS NAMES:

An individual doing business under a firm name, which includes only the surname, a word descriptive of the business and the word "company," should register under the Fictitious Names Registration Act. A person using both the surname and Christian name is not required to register.

October 27, 1949

Honorable W. Randall Smart Supervisor of Corporations Office of Secretary of State Capitol Building Jefferson City, Missouri



Dear Mr. Smart:

This is in reply to your request for an opinion which reads as follows:

"We are sending inquiries to companies operating in the state which are not registered under the Fictitious Name Act (Chapter 140, Article 3, Section 15466, etc., R.S. 1939).

"Some of these companies are answering they are not subject to the requirements therein, in that, they are operating under their own names. For example, the following letter was received.

"September 8, 1949

"Mr. Walter H. Toberman, Secretary of State Office of Secretary of State Jefferson City, Missouri

Dear Sir:

Attn: W. Randall Smart

Corporation Supervisor

Received your letter 'Fictitious Name Act', I quote your letter in part-

"'In the event you are operating as a partnership or doing business as an individual, you should register under the Fictitious Name Act.'

"As I am operating under my own name, I do not see why I should register.

"Please advise.

Yours respectfully,

KLASEK LETTER COMPANY Chas. W. Klasek

"We would appreciate your opinion on this question. Would the name 'Klasek Letter Company' be subject to registration under the Fictitious Name Act, where the sole owner is one Charles W. Klasek? We believe it should be registered.

"Also, would you please let us have your opinion as to what words, names or phrases of words or names, all inclusive, constitute operating under your own or true name, which would exempt the registration therein under this act.

"In view of the large number of unregistered business concerns in the state and our special effort at this time to effect a compliance with this act, we would appreciate your opinion at your earliest convenience."

The Missouri statutes requiring the registration of fictitious names are as follows:

"Sec. 15466. Fictitious names.—That every name under which any person shall do or transact any business in this state, other than the true name of such person, is hereby declared to be a fictitious name, and it shall be unlawful for any person to engage in or transact any business in this state under a fictitious name without first registering same with the secretary of state as hereinafter required."

"Sec. 15467. Registration required, when, how.--Every person who shall engage in business in this state under a fictitious name or under any name other than the true name of such person shall, within five days after the beginning or engaging in business under such fictitious name, register by verified statement of all parties concerned, upon blanks furnished by the secretary of state, such name in the office of the secretary of state, together with the name or names and the residence of each and every

person or corporation interested in or owning any part of said business, and setting forth the exact interest therein of each and every such person or corporation: Provided, that if the interest of any person named in the original registration of such fictitious name shall change or cease to exist, or any other person shall become interested therein, such fictitious name shall be reregistered within five days after any change shall take place in the ownership of said business or any part thereof as set forth in the original registration, and such reregistration shall in all respects be made as in the case of original registration of such fictitious Provided, that the provisions of this section shall not apply to farmers' mutual insurance companies nor farmers' mutual telephone companies."

"Sec. 15470. Definition of word.--For the purposes of this article the word 'person' shall be construed to include both male and female, plural and singular, partnerships, associations and corporations, as the circumstances of the case may require."

Section 15469 provides a penalty for failure to register, and is as follows:

"Any person who shall engage in or transact any business in this state under a fictitious name, as in this article defined, without registering such name as herein required, shall be deemed guilty of a misdemeanor."

Fictitious name statutes have been enacted in virtually all the states. The general purpose of such statutes is set out in 45 A.L.R. at page 204, which reads as follows:

"The remedial purpose of such statutes is that the public may have ready means of information as to the personal or financial responsibility behind the assumed or fictitious name. Sagal v. Frylar (1951) 89 Conn. 293, L.R.A. 1915E, 747, 93 Atl. 1027.

"What the legislature had in view in enacting the Illinois statute subjecting to a fine persons assuming a corporate name for the purpose of soliciting business, without being incorporated, was to prevent persons from obtaining a fictitious credit by advertising themselves as being a corporation when they were not incorporated. Edgerton v. Preston (1884) 15 Ill.App. 23; First Nat. Bank v. Cox (1908) 140 Ill.App. 98.

"It was said in Humphrey v. City Nat. Bank (Ind.) supra, that the obvious purpose of the statute was to give information as to the persons who should be named as defendants and served with process, in case suit were brought on a cause of action arising out of any business done in the assumed name or out of any contract made in such name.

"The object of the statute is to enable the public, as well as those who deal with the concern, to ascertain definitely who is the real person or persons behind the business, in case litigation arises; it is a part of the public policy of the state and is intended to protect and safeguard the rights of its citizens. Warren Oil & Gas Co. v. Gardner (1919) 184 Ky. 411, 212 S.W. 456; Acme Drilling Co. v. Gorman Oil Syndicate (1923) 198 Ky. 576, 249 N.W. 1003.

"The object of such statute is to prohibit persons from concealing their identity in their business transactions under the cloak of assumed or fictitious names; if the identity is not disclosed in the name or designation employed, then it must be disclosed in the public record provided for that purpose. Canonica v. St. George (1922) 64 Mont. 200, 208 Pac. 607."

The Missouri statute was passed by the 50th General Assembly and became effective May 24, 1919. The Act carried an emergency clause which reads as follows (Laws of Missouri, 1919, page 622):

"Sec. 7. Emergency.--Whereas there is no adequate law i this state governing the transaction of business under a fictitious name, and whereas hundreds of thousands of dollars are annually lost to honest business by the use of fictitious names, and whereas the use of a fictitious name affords a convenient vehicle for the perpetration of fraud an emergency is declared to exist within the meaning of the Constitution; therefore this act shall take effect and be in force from and after its approval."

In order to determine the question submitted, we have examined cases from various jurisdictions in which the question before the Court was whether or not the use of the surname followed by a descriptive term of the business and the word "company" was fictitious so as to require registration under statutes similar in nature. An extensive annotation in 45 A.L.R. at page 198 covers many cases in which this point was before courts for determination. However, in almost every instance where a court held that the use of a surname without the Christian name was not in violation of such statute, two features were present: (1) The statute in question covered only partnerships and by its own terms was not applicable to individuals (See: Wetenhall v. Chas. S. Mabrey Const. Co., 209 Calif, 293, 286 Pac. 1015; Vagin v. Brown, 146 Pac. (2d) 923), or (2) the statute provided for a severe penalty in the nature of a refusal to enforce contracts of such a business. The Missouri statute by its terms applies to individuals as well as partnerships, and the Missouri Supreme Court, in the case of Kusnetzky v. Security Insurance Company, 281 S.W. 47, held that a failure to register a fictitious name does not make a contract entered into by a party under a fictitious name unenforcible.

As seen above, the wording of the statute providing for registration of a fictitious name is, in part, as follows:

"That every name under which any person shall do or transact any business in this state, other than the true name of such person, is hereby declared to be a fictitious name."

Thus, we have a legislative declaration that a fictitious name is any name other than the true name of a person engaging in a business. The immediate question for consideration is whether or not the use of the surname without the Christian name is in compliance with the statute.

In 38 Am. Jur. at pages 595 and 596, the text is as follows:

"Originally, there was no such thing as a surname, or family name, and a person was identified only by his given or Christian name. The insufficiency of the Christian name to distinguish the particular individual, where there were many bearing the same name, led necessarily to the giving of surnames; subsequently, a man was distinguished, in addition to his Christian name, in the great majority of cases, by the name of his estate, the place where he was born, where he dwelt, or whence he had come, or else from his calling as John the smith, or William the tailor, in time abridged to John Smith and William Taylor. * * *

"At the present time, according to the custom of English-speaking people, each person bears a family name, which is continued from parent to child, and to which is prefixed one or more words constituting his more specifically personal appellation and distinguishing his from others of the same family appellation. The former is spoken of as the surname, and the latter as the given or Christian name, and is ordinarily selected from his in infancy by his parents. * * *"

And, again, at page 596:

"The Christian or first name is, in law, denominated the 'proper name,' and has been used from early times to distinguish a particular individual from his fellows. It is usually conferred upon a person at birth or at baptism, and was originally the only name which was recognized in law. Consequently, it has always been considered an essential part of a person's name, and the giving of a wrong Christian name to a person, in legal proceedings or in conveyances, generally constitutes an error which may invalidate a judgment or deprive the record of an instrument of its effect as notice. It has been held that the law knows but one Christian name for a single individual."

(Underscoring ours.)

Thus, from the above, we see that in the early days there was no such thing as a surname and the method of identification of persons was by use of the Christian name. The surname was added for further identification of an individual. As stated in the text, the Christian name was originally the only name which was recognized in law and so has always been considered an exsential part of a person's name.

In the case of Turner v. Gregory, 52 S.W. Rep. 234, the Supreme Court of Missouri indicated that the above rule is the one which would be adopted in this state. At l.c. 235, the Court said:

"* * * What shall be considered the name of a defendant is not always so plain. One general rule has been to hold the first Christian name as essential, and to hold that the middle name is not part of the man's name, or at least not necessary to his designation. * * *"

In the case of In re Conde et al., 61 Atl. (2d) 198, the Supreme Court of New Jersey in the course of an opinion at 1.c. 199, said:

"* * * At common law a legal name consisted of a given and of a surname or family name. * * *"

In the case of Dunn & McCarthy, Inc. v. Pinkston, 175 S.E. 4, the Supreme Court of Georgia had for consideration the question whether or not a retailer by the name of James A. Pinkston, Jr., trading in the name of Pinkston Company was doing business in violation of the Fictitious Names Registration Act. The Act in question provided, in part, 1.c. 5:

"'it shall be unlawful for any person, persons, or partnership to carry on, conduct, or transact any business in this State under an assumed, fictitious, or trade-name, or under any other designation, name, or style, other than the real name or names of the individual or individuals conducting or transacting such business, * * *.'"

The Court, in disposing of the case, necessarily ruled that the individual was in violation of the law for not registering the trade name under which he was doing business. James A. Pinkston, when trading in the name of Pinkston Company, was conducting a business in a name other than the real name of the individual.

In a recent Pennsylvania case, Alleman v. Lowengart, et al., 63 Pa. D. & C. 430, the court was considering the question whether or not the J. J. Alleman Electric Company was such a name as to be within the purview of the Fictitious Names Act. We quote extensively from that case because the court reviews the authorities on the subject. The court said, l.c. 431:

"The position of plaintiff is that he was not required to register under the Fictitious Names Act of 1945 because the name, J. J. Alleman Electric Company, was not such a name as is within the purview of the act since it disclosed the name of the only person interested in the business. The first question which we must determine is whether J. J. Alleman Electric Company is a fictitious name within the purview of the Fictitious Names Act of 1945. Whether or not the name, J. J. Alleman Electric Company. is a fictitious name when the only person interested in the business transacted under that name is J. J. Alleman, depends entirely on the effect of the word 'Company'. In Webster's New International Dictionary 'company' is defined as 'An association of persons for a joint purpose or performance, esp. for carrying on a commercial or industrial enterprise or business'. 'Those members of a partnership firm whose names do not appear in the firm name.' Collog. In Bouvier's Law Dictionary, Baldwin's Cen. Ed., 'company' is defined as 'An association of a number of individuals for the purpose of carrying on some legitimate business.' We find no appelate court decision in Pennslyvania which holds that the use of the word 'company' in a trade name, for a business owned entirely by one individual whose name appears in the trade name, constitutes a fictitious or assumed name within the purview of either the Fictitious Names Act of June 28, 1917, P.L. 645, as amended by the Act of June 29, 1923, P.L. 979, 54 PS 21, or the Fictitious Names Act of 1945, supra. Both of these acts use the same words 'No individual or individuals shall hereafter carry on or conduct any business in this Commonwealth under any assumed or fictitious name, style, or designation, unless . . .,' so the decisions under the older act in regard to this particular matter are relevant in the interpretation of the later act. The Superior Court, however, in Snaman v. Maginn,

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77 Pa. Superior Ct. 287, 289, seems to assume that one person, E. U. Snaman, trading as the Snaman Realty Company, was trading under an assumed or fictitious name. There was no contention otherwise, so, although the direct question was not raised, as the case was decided on the premise that plaintiff was doing business under an assumed name without complying with the Act of June 28, 1917, P.L. 645, supra, it is at least some authority for the conclusion that where one person does business under a trade name, including the word 'company', he is trading under an assumed or fictitious name.

"In the case of Ferraro et al. v. Hines, Director Gen. of R.R., etc., 77 Pa. Superior Ct. 274, it was held that two persons operating under the name 'A. Ferraro & Company', were operating under an assumed or fictitious name, as 'company' did not disclose the names of the other person or persons interested in the business.

"In Commonwealth to use of Hagerling Motor Car Co. v. Palmer et al., 3 D. & C. 650, Judge Hargest of Dauphin County held flatly that L. H. Hagerling, sole owner, doing business as 'Hagerling Motor Car Company', was within the purview of the Fictitious Names Act of 1917, supra. He states on page 651:

"'In Mangan v. Schuylkill County, 273 Pa. 310, it is held that the word "fictitious", as used in this act of assembly, is explanatory of "assumed", and means "pretended", "not real", "arbitrarily invented or devised". "The Hagerling Motor Car Company" is certainly within this definition. An individual cannot be a company. This name implies a corporate existence rather than a single individual trading in that capacity. Therefore, it is a pretended and arbitrarily devised name. The word "company" gives no notice as to who compose it'.

"The basis of the decision is clearly that the fact that the word 'company' is used in the trade name, even though only one person, whose surname is also part of the trade name, is the sole proprietor, makes the trade name a

fictitious or assumed name within the purview of the Fictitious Names Act of 1917, supra.

"In Stevens v. Meade, 13 D. & C. 9, it was held that Albert Stevens, trading as Albert Stevens Hardwood Flooring Company, was not a fictitious name. It is a little difficult to ascertain from the opinion whether the court held that 'Albert Stevens, trading as Albert Stevens Hardwood Flooring Company' is not a fictitious name or 'Albert Stevens Hardwood Flooring Company' is not a fictitious name.

"We realize that in other jurisdictions under similar acts, although somewhat different in their provisions, the word 'company' is held not to constitute a fictitious name if the name of the sole proprietor is also part of the trade name. For instance, 'McCreery Machinery Company', in McCreery v. Graham et al., 121 Wash. 466, 209 Pac. 692, and 'George W. Merrill Automobile Company', in Merrill v. Caro Inv. Co., 70 Wash. 482, 127 Pac. 122, were held not to be assumed names. See 45 A.L.R. 260-262. In a late case, Tate v. Atlanta Oak Flooring Co., et al., 18 S.E. (2d) 903 (Va.), the Supreme Court of Appeals of Virginia held that A. E. Tate, the sole owner of the business trading as 'A. E. Tate Lumber Company' was not trading under an assumed or fictitious name within the purview of the Virginia statute forbidding any person from conducting or transacting business under any assumed or fictitious name without registration. However, it is clear in this case that, under the provisions of the statute in question, a person making a contract while trading under a fictitious name without registration was precluded from recovering on the contract. This may have largely influenced the court in giving the statute a very strict interpretation.

"In our opinion the use of the word 'company' in a trade name, although the full name of the individual operating under the trade name is disclosed in it, in addition to the word 'company', constitutes a fictitious or assumed name within the purview of the Fictitious Names Act of 1945, supra. The word 'company' clearly

indicates an association of persons carrying on a business and, as only one person is carrying on the business under a name which indicates an association, such person necessarily is conducting the business under an 'assumed or fictitious name, style, or designation'. * * * *"

We have been unable to find any cases from Missouri courts directly on the point in question. However, in 1946, the District Court for the Western District of Missouri, through Judge Reeves, indirectly ruled on the question before us. In the case of Cummings v. Riley Stoker Corporation, et al., 6 F.R.D. 5, the Court was considering the question of jurisdiction of a case which had been removed to the Federal Court. The plaintiff filed a motion to remand. In the course of the opinion the following facts and comments thereon is set out, 1.c. 5 and 6:

"The motion to remand is supported by the above mentioned affidavit of Elmer L. Hughes, and which affidavit stated that he had been doing business in Kansas City, Missouri, 'for the past twenty-three years; that he as an individual has done business under the name of "Hughes Machinery Company"; that his place of business is now located at 4034 Broadway, Kansas City, Missouri; that "Hughes Machinery Company" is not now and never has been a corporation organized under the laws of the State of Missouri or the laws of any other state.'

* * * * * * * *

"The petition for removal does not allege fraudulent joinder. It does not, therefore, challenge the good faith of the plaintiff. The averment is that there is no such an entity as Hughes Machinery Company. Apparently the sheriff, in making his return, had reason to believe that E. C. Waldsmith was manager of both the Riley Stoker Corporation, as well as Hughes Machinery Company, the trade name of Elmer L. Hughes. This may logically be inferred from his return.

"The rule is, as announced by all of the authorities, that a nonresident defendant, in
seeking removal, must allege facts which compel
the conclusion that the joinder is fraudulent,
that is to say, bad faith on the part of the

plaintiff. Chesapeake & Ohio R. Co. v. Cockrell, 232 U.S. 146, 34 S. Ct. 278, 58 L. Ed. 544. Doubtless the nonresident defendant relies on the mere averment which is true, that there is no such corporate entity as Hughes Machinery Company, and he was served in his fictitious name. Whether in thus transacting business he complied with Article 3, Chapter 140. R.S. Mo. 1939, Mo. R.S.A., does not appear. By Section 15466 it is required that every name under which any person shall do or transact any business in this state 'other than the true name of such person, is hereby declared to be a fictitious name, and it shall be unlawful for any person to engage in or transact any business in this state under a fictitious name without first registering same with the secretary of state as hereinafter required.'

"Other sections of the statute make it a misdemeanor for a person to transact business in this way without such registration. Assuming that Elmer L. Hughes, as Hughes Machinery Company, was registered with the secretary of state, the records there, while available to the plaintiff would not necessarily be such notice as would challenge his good faith in joining and using the fictitious name adopted by the said Hughes as a corporation. The name is such as may ordinarily be employed by a corporation, and it was a reasonable inference that it was a corporation. The plaintiff was endeavoring to join a local defendant and apparently there was one to be joined."

Thus, it is seen that when a similar question was presented to the Federal District Court, at least one Judge was of the opinion that the name "Hughes Machiney Company" should have been registered with the Secretary of State under the Fictitious Names Registration Act. In view of this case, other authorities above and in the view of the evident purpose of the state, we believe that when an individual is transacting business under a name such as the Klasek Letter Company, he is transcting business in a name other than his true name, and the name should be registered with the Secretary of State and the necessary information should be given in accordance with the provisions of Section 15467, R. S. Mo. 1939. When a name is so registered, persons having business relations with such a firm may easily

be apprised of the make-up of that firm and the addresses of the persons interested therein are made available.

We believe that the above disposes of the main question in your request. The only other name which would conceivably be questioned would be the case wherein a sole owner operated a business using his full name, for example, Charles W. Klasek Letter Company. In answer to this, we refer you to the recent case of Tate v. Atlante Oak Flooring Company, 18 S.E. (2d) 903, in which case the Supreme Court of Appeals of Virginia held that a sole owner trading under the name of "A. E. Tate Lumber Co." sufficiently dislocsed the true name of the individual transacting the business so as not to require the filing of a certificate under the Fictitious Names Act. Under the principles of law set out above, we believe that the same rule would apply in Missouri. and that such an individual would not be required to register under Section 15466, R. S. Mo. 1939. However, in such cases if there were others interested in a business being conducted under such a name as Charles W. Klasek Letter Company, and Charles W. Klasek was not the sole owner, the Act would necessarily require registration for such persons would be doing business under a name other than their true name.

CONCLUSION

Therefore, it is the opinion of this department that a sole owner doing business under a firm name, which includes only the surname and a word descriptive of the business and the word "company," should register under the Fictitious Names Registration Act.

We further believe that a sole owner doing business under a firm name which consists of the surname and the Christian name of that individual with a word or words descriptive of the business and the word "company" is not required to register by the provisions of the Fictitious Names Registration Act.

Respectfully submitted,

APPROVED:

JOHN R. BATY Assistant Attorney General

J. E. TAYLOR Attorney General ELECTIONS)
REFERENDUMS)
LEGISLATURE)
APPROPRIATIONS)

Special election for referendum may be ordered by General Assembly at a special session. Expenses incurred at such election may be paid by the state if law authorizing such payment is passed.

October 28, 1949

1/3/49

Honorable Forrest Smith Governor of Missouri Executive Offices Capitol Building Jefferson City, Missouri



Dear Governor Smith:

This is in answer to your letter of recent date requesting an official opinion of this Department and reading as follows:

"I have your opinion of September 27, 1949, concerning the authority of the legislature to order a special election at which House Bill No. 185 of the Sixty-fifth General Assembly may be referred to a vote of the people if sufficient referendum petitions are filed with the Secretary of State.

"I would like to have your opinion as to

- " l whether or not this election may be ordered by the General Assembly at a special session called by the Governor, and
- " 2 whether or not the expenses incurred by the counties in such an election may be paid for by the State of Missouri."

Section 9 of Article IV of the Constitution of Missouri provides in part as follows:

" * * * On extraordinary occasions he may convene the general assembly by proclamation, wherein he shall state specifically each matter on which action is deemed necessary."

The general rule is that in the absence of any constitutional restriction, the power of the Legislature at an extraordinary

session is as broad as the power at a regular session. We find the rule stated in 50 Am. Jur. 63, as follows:

"In the absence of a constitutional provision limiting the power of the legislature to pass laws at a special session, its legislative power when convened in special session is as broad as a regular session. * * *"

In Volume 59 C. J., at page 528, we find the following:

"Where there is no constitutional restriction upon the authority of a legislative body in special session, it may enact any law at such session that it might at a regular session. * * *

In the case of State v. Rawlings, 134 S.W. 530, the Supreme Court of Missouri said in discussing what is now subsection 7 of Section 39, Article III of the Constitution of Missouri, at 1.c. 533:

" * * * By this last-named section of our organic law, undoubted power is conferred to enact any laws which the Governor may by special message recommend to the General Assembly after it has been convened in extraordinary session. * * *"

Section 52, Article III of the Constitution provides in part as follows:

" * * * All elections on measures referred to the people shall be had at the general state elections, except when the general assembly shall order a special election. * * *

The power of the General Assembly to order a special election as provided in the quoted portion of Section 52, Article III of the Constitution, supra, is not limited to the regular sessions thereof. Such special election may be ordered by the General Assembly at an extraordinary session convened by the Governor.

The authority of the General Assembly at an extraordinary session is limited only by the provisions of Section 9 of Article IV and Subsection 7, Section 39 of Article III of the Constitution. Subsection 7 of Section 39 of Article III provides as follows:

"The General assembly shall not have power:

* * * * * * * * * * * *

"To act, when convened in extra session by the Governor, upon subjects other than those specially designated in the proclamation calling said session or recommended by special message to the general assembly, after the convening of an extra session." In the case of State v. Adams, 19 S.W. (2d) 671, the Supreme Court of this state said at 1. c. 674:

" * * * The law is well settled in this and other jurisdictions. The authority of the General Assembly, in special session, to legislate must be found in the proclamation convening the Assembly or in a special message to the Assembly after it convenes. Section 55, art. 4, Constitution. And the Governor must 'state specifically each matter concerning which the action of that body (assembly) is deemed necessary.' Section 9, art. 5, Const. These provisions are mandatory. * * *"

Therefore, the ordering of a special referendum election by the General Assembly as authorized in Section 52 of Article III of the Constitution may be accomplished by the General Assembly at an extraordinary session. There is at present no authority for the payment to counties by the State of Missouri of expenses incurred by the counties in holding elections. Therefore, the legislature can not at present appropriate money for payment to the counties for expenses incurred in holding an election because general legislation can not be included in an appropriation act. In the case of State ex rel. v. Canada, 113 S.W. (2d) 783, the Supreme Court of this state said at 1. c. 790:

" * * * Legislation of a general character cannot be included in an appropriation bill. To do so would violate section 28 of article 4 of the Constitution, which provides that no bill shall contain more than one subject which shall be clearly expressed in its title. * * *"

The Constitution of the State of Missouri is a limitation on power and not a grant of power, therefore, the legislature may enact any law not specifically prohibited by the Constitution. In the case of McGrew v. Paving Co., 247 Mo. 549, the Supreme Court said at 1. c. 570:

" * * * In the absence of constitutional limitations the Legislature is supreme and may enact any law which in its wisdom it may deem best for the residents of our municipalities and the people of the State at large. In other words, the Legislature represents the sovereign people, who have unlimited power to enact laws, except as limited by the State and Federal constitutions; and in the absence of such limitations all enactments of the Legislature are valid and binding, however unreasonable and oppressive they may be. This is elementary. * * *

Section 10 of Article X of the Constitution provides in part as follows:

"Nothing in this Constitution shall prevent the enactment of general laws directing the payment of funds collected for state purposes to counties or other political subdivisions as state aid for local purposes."

Therefore, if a law is enacted providing that the state shall pay to the counties the expenses incurred by the counties in holding referendum elections, appropriations may be made under authority of such law whether an appropriation for such payment is for a "state purpose", or a "local purpose" since the enactment of a law authorizing such payment is not prohibited by the Constitution. The effective date of a law authorizing the payment by the state to the counties for such expenses would be governed by the provisions of Section 29, Article III of the Constitution.

CONCLUSION.

- l. It is the opinion of this Department that the General Assembly may at an extraordinary session order a special referendum election, if such purpose is designated in the Governor's Proclamation convening such extraordinary session or in a special message by the Governor to the General Assembly at such session.
- 2. It is further the opinion of this Department that under the present law, the State of Missouri cannot pay to the counties the expenses incurred by the counties in holding such election. The General Assembly may provide by general law that the State of Missouri shall pay to the counties the expenses incurred in holding referendum elections, and if such law is passed, appropriations for this purpose may be made by the State of Missouri.

Respectfully submitted,

C. B. BURNS, JR. Assistant Attorney General

APPROVED:

J. E. TAYLOR Attorney General June 27, 1949

Honorable Forrest Smith Governor of Missouri Executive Office Jefferson City, Missouri



Dear Governor Smith:

I am in receipt of your request for an official opinion which reads as follows:

"Senate Bill No. 102, which has recently been passed by the General Assembly, is before me for consideration. The City of St. Louis has raised the question of the constitutionality of this bill.

"I would appreciate it if you will please furnish me an opinion on the question of whether or not this bill is constitution-al."

In the preparation of this opinion we have dealt entirely with the legal aspects of the bill, and we do not pass upon its wisdom or the practical effects thereof, because that is a matter which is left entirely to the Legislature and the Governor, and is not a proper function of the courts or this department.

Senate Bill No. 102 which has passed both Houses of the General Assembly provides as follows:

"Section 1. No building, structure or erection on any real estate located within any city of more than 600,000 inhabitants in this state, which is used or intended to be used primarily for residential housing purposes and which has been or may hereafter be acquired by the state highway commission or by any such city for the purpose of locating, or constructing any state

highway, shall be destroyed, removed, or otherwise rendered unfit for residential housing, nor shall any tenant or occupant of any such building or structure be evicted therefrom for the purpose of locating or constructing any such highway by the state highway commission or by any such city for a period of two years next after the effective date of this act.

"Section 2. Actions, by injunctive process or otherwise, to enforce this act may be brought against the state highway commission, or against any city in any city where such real estate is located.

"Section 3. This act is designed to prevent acute distress of great numbers of persons within cities of over 600,000 inhabitants, who are about to be forced out of their residences by reason of the carrying out of projects to locate state highways by the state highway commission and the City of St. Louis, within said City of St. Louis, and the General Assembly hereby declares that this act is necessary for the immediate preservation of the public peace, health and safety and an emergency exists within the meaning of the constitution. This act, therefore, shall be in full force and effect from and after its passage and approval."

A reading of the above bill discloses that its purpose is to delay for a two year period, the eviction of persons living in houses which are owned by the state or by a city, which houses have been acquired by the state or city as the part of a right-of-way for the construction of a state highway. The reason that the Legislature provided for such delay is that it is common knowledge that in large metropolitan areas there is a serious shortage of houses and for the state or one of its political subdivisions to evict tenants from houses owned by the state or the political subdivision would cause a severe hardship, not only upon the persons so affected, but upon the economic and general welfare of the metropolitan area. That a court may take judicial notice

of such condition has been settled in this state by the cases of Saxbury vs. Coons, 98 S.W. (2d) 662, and State ex rel. Short Line Railroad Company vs. Public Service Commission, 339 Mo. 641, 98 S.W. (2d) 699.

It is equally well-settled in this state that the Legislature under its police powers may pass laws for the social or political well being of the state, and that such power is elastic in its nature in order "to meet changing and shifting conditions which from time to time arise through increase of population and complex commercial and social relations of the people." Graff vs. Priest, 201 S.W. (2d) 945.

At the outset, we believe that it is necessary to call your attention to certain facts which will necessarily enter into the discussion of the constitutionality of Senate Bill No. 102. It is obvious that the bill, if approved, will apply for the next year only to the City of St. Louis. After the 1950 decennial census it is possible that it may apply to other cities of this state. Further, we are informed that on July 13, 1948, the State Highway Commission entered into an agreement with the City of St. Louis regarding the building of a state highway through the city. Under such agreement the city agrees to acquire the necessary right-of-way by purchase or condemnation in the name of the Commission and as its agent, and the Commission agrees to construct the project, at no cost to the city, from State and Federal funds and the city agrees to pay one-third of the right-of-way costs. The city further agrees to make the initial payment for the right-of-way and be reimbursed by the Commission for two-thirds of such costs. There are other provisions in the agreement but we believe that, insofar as this opinion is concerned, the above is sufficient to apprise you of the facts necessary for an understanding of the later discussion.

Further, there have been certain negotiations between the Missouri State Highway Commission and the Public Roads Administration of the Federal Works Agency in regard to the St. Louis project.

Under the provisions and requirements of the regulations of the Public Roads Administration of the Federal Works Agency, the State Highway Commission, in order to obtain Federal monies for use in constructing state highways, submitted a program of proposed projects to the Public Roads Administration. Included in said program was the St. Louis project. Said program was approved by the Public Roads

Administration. An individual project statement relating only to the St. Louis project was submitted by the State Highway Commission to the same Agency, which project statement was approved. In the approved project statement the State Highway Commission asked that they be reimbursed by the Federal Government for the Federal Government's share of the expenses incurred in:

 Making the preliminary engineering survey and plans;

The acquisition of the right-of-way, and,

3) The construction of the highway.

Pursuant to this approved project statement, the State Highway Commission and the Public Roads Administration have entered into a project agreement by which the Federal Government agrees and contracts to pay to the State Highway Commission its share of the preliminary engineering survey and plans. At this time there have been no project agreements between the Public Roads Administration and the State Highway Commission that the Federal Government will reimburse the state for the expenses incurred under the second and third items listed above, that is, the acquisition of the right-of-way and the construction of the highway.

With these facts in mind we will take up the various Federal and State constitutional questions which are raised by Senate Bill No. 102. However, this opinion will not deal with the validity of the emergency clause because, while it is a constitutional question, still such clause is not an essential part of the bill, and does not go to its merits but only relates to the time it shall take effect. An emergency clause which is unconstitutional does not, in any way, affect the rest of the bill but is severable.

I.

No question as to the right of the State Highway Commission or a city of 600,000 inhabitants to condemn property is raised by Senate Bill No. 102.

We believe it is proper at the outset to point out that Senate Bill No. 102 does not, in any way, relate to or affect the right of the State Highway Commission or a city of 600,000 inhabitants to acquire property by purchase or by condemnation. A reading of the Act discloses that it is applicable only after the property has been acquired, either by purchase or condemnation. Therefore, we do not believe it is necessary to discuss in this opinion what rights, constitutional and statutory, the State Highway Commission or a city might have to acquire property by purchase or condemnation, and whether these rights may be impaired or abrogated by action of the General Assembly.

The Legislature has the power to limit the authority of the State Highway Commission to construct state highways.

The power of the Legislature to limit the authority of the State Highway Commission to construct and reconstruct state highways is derived from the Constitution of Missouri. Thus, Section 29, Article IV, in part, provides:

"The department of highways shall be in charge of a highway commission. * * * It shall have authority over and power to locate, relocate, design and maintain all state highways; and authority to construct and reconstruct state highways, subject to limitations and conditions imposed by law as to the manner and means of exercising such authority; * * *"

In a recent opinion to Senator John W. Noble this department had occasion to construe the above quoted section of the Constitution. In that opinion we concluded that this constitutional provision "provides no limit, with regard to the Commission's exercise of its powers to locate, relocate, design and maintain highways." However, we further concluded in that opinion that "the authority of the Commission to construct and reconstruct state highways shall be subject to limitations imposed by law as to the manner and means of exercising such authority." It is, therefore, our thought that whereas certain authority of the Commission in the creation of state highways is free and unrestrained, certain other authority, i.e., to construct and reconstruct, is subject to legislative limitations.

It is our view of the matter that the provisions of Senate Bill No. 102 in prohibiting the destruction or removal of buildings used or to be used as dwellings for a period of two years would be a limitation imposed by the Legislature only upon the authority of the Commission to construct a state highway. The bill in no wise prevents the Commission from determining the location of a state highway, designing it architecturally and according to plans and specifications or from maintaining it after it is constructed.

The act of razing structures along the path and in the area that a highway is located, we believe, is merely one of the preliminary steps in the process of constructing it, the same as would be the removal of certain objects of nature such as large trees, boulders or the grading down of a hill. The effect of Senate Billi No. 102, directed at this particular element or phase of construction, we believe limits its performance as to manner or means by retarding or delaying it. The further effect of the bill could well be that the manner and means of construction of a highway would be changed in that other phases or steps in construction would be performed at an earlier or later time from what would be standard operating procedure were the bill not in existence.

Senate Bill No. 102 is not in violation of any constitutional provision prohibiting enactment of special or local laws.

The point has been raised that Senate Bill No. 102 is unconstitutional because it violates certain provisions of our State Constitution forbidding the enactment of local or special laws in that it is applicable to the City of St. Louis alone. The constitutional provisions that the act allegedly violates are Sections 40, 41, and 42 of Article III.

Sec. 40 forbids the general assembly to pass any local or special law "(15) vacating town plats, roads, streets or alleys; * * * (17) authorizing the laying out, opening, altering or maintaining roads, highways, streets or alleys."

Sec. 41 denies to the general assembly the right to indirectly enact a special law by the partial repeal of a general law.

Sec. 42 forbids the passage of a local or special law absent publication of a notice setting out the intention to apply therefor and the substance of the contemplated law. It further requires that such notice be published thirty days before the introduction of the law, and proof of publication must be filed before the act is passed and the notice must be recited in the act.

In reading Section 1 of the act, we observe that a classification is set up based on population, in that the provisions of the act are applicable to any city in the state of more than 600,000 inhabitants. According to the United States Decennial Census of 1940, the City of St. Louis is the only city which the state with more than 600,000 inhabitants, and would therefore be the only city to which the act would presently apply. It has been held by our Supreme Court that where a classification is based upon population, and the act is silent as to how the population is to be determined, then, the standard for determining the population is the United States Decennial Census. Reals v. Coursen, 164 S.W. (2d) 306, 349 Mo. 1193. Thus, under the facts, the question confronting us is whether or not Senate Bill No. 102 is a local or special lawin violation of any constitutional prohibitions.

In Reals v. Courson, supra, the Supreme Court in stating the rule of classification of counties and other political subdivisions said, at S.W. 1.c. 307-308:

"In 1880 we adopted Pennsylvania's distinction between or definition of 'special' and 'general' laws. 'A statute which relates to persons or things as a class, is a general law, while a statute which relates to particular persons or things of a class is special' is the way the matter is roughly and broadly put and that suffices for normal purposes. # # # Under this definition it is permissible to classify counties or other political subdivisions according to population, provided the legislation is so drawn that other counties or subdivisions may come within the terms of the law or classification in the future. And this is so even though the act may apply to one county, city or other political subdivision only at the time of its enactment. Hull v. Baumann, 345 Mo. 159, 131 S.W. 2d 721; Roberts v. Benson, 346 Mo. 676, 142 S.W. 2d 1058; Thomas v. Buchanan County, 330 Mo. 627, 51 S.W. 2d 95; Davis v. Jasper County, 318 Mo. 248. 300 S.W. 493. * * *."

Again, in the later case of State ex rel. Fire District of Lemay v. Smith, 184 S.W. (2d) 593, 353 Mo. 807, the court said, at S.W., 1. c. 595:

"St. Louis County is the only county now within the population bracket stated in the act. Such fact alone does not make the act a special law for the reason the act will also apply to other counties which will attain the same population in the future. Where an act is potentially applicable to other counties which may come into the same class it is not a local law. * * *"

The duration of the act in question is for two years. However, within this period of time, the act is potentially applicable to other cities, such as Kansas City, which may possibly attain the necessary population as may be determined under the United States Decennial Census of 1950, which will be taken before the act expires.

Senate Bill No. 102 was undoubtedly enacted to cope with a condition prevailing in congested areas falling within the population bracket. Because there may be other congested areas

in the state to which the same act might have been applied, does not stamp the classification in the act as unreasonable or arbitrary. Our Supreme Court has held that population alone is a reasonable basis for classification, and it is only necessary that the act apply to all places of the same population designated in the law. Thus, in the Fire District of Lemay case, supra, the Supreme Court in overruling the discussions in earlier cases leading to opposite conclusions declared at S.W., l.c. 595:

"Respondent argues the Legislature does not give the right of organizing fire districts to all the congested areas that need it, but only to those areas in counties covered by the act and for that reason the act is arbitrary, and contrary to the rule expressed in State ex rel. Hollaway v. Knight, 323 Mo. 1241, 21 S.W. 2d 767 and quoted in Hull v. Baumann, supra (345 Mo. 159, 131 S.W. 2d 724), as follows: 'But a law general so far as population is concerned may be a special law if the classification made therein is unnatural. unreasonable, and arbitrary so that the act does not apply to all persons, objects, or places similarly situated. This statement is too broad and is not supported by the decisions. Where, as here, population is a reasonable basis for classification it is only necessary that the act apply to all places of the same population designated in the law. The fact there may be congested areas in counties having a different population does not make the act a special law. The discussions leading to opposite conclusions in State ex inf. Gentry v. Armstrong, 315 Mo. 298, 286 S.W. 705; Rose v. Smiley, Mo. Sup., 296 S.W. 815; and State ex rel. Gentry v. Curtis, 319 Mo. 316, 4 S.W. 2d 467, are not in harmony with the prevailing rule. * * *

"The act we are considering applies generally to all congested areas similarly situated, that is-situated in counties of the same population bracket. Because there are other congested areas to which the same act might have been applied does not stamp the classification as unreasonable. * * * ".

In connection with this point, we consider it worthwhile to present the view adopted by the United States Supreme Court in

the case of Williams v. Baltimore, 289 U.S. 36, 77 L. Ed. 1015, wherein the court was ruling on the constitutionality of an act of the State of Maryland, specifically exempting the property from taxation of a particular railroad named in the act which was about to cease operation due to lack of funds. The act was attacked on the ground that it was a special law and in violation of Article III, Section 33 of the Maryland Constitution, which provided: "The General Assembly shall pass no special law for any case for which provision has been made by an existing general law." This constitutional provision is similar to that of Section 41, Article III, of our Missouri Constitution. In upholding the act, the court, speaking through Justice Cardozo, said at L. Ed., l.c. 1023-1024:

"The statute is not repugnant to Article 3, Section 33, of the Maryland Constitution, wherein it is said that 'the General Assembly shall pass no special law for any case for which provision has been made by an existing general law.'

"* * There has been need, now and again, to develop close distinction. Our endeavor in what follows is to extract the essence of the decisions and to give effect to it as law.

"Time with its tides brings new conditions which must be cared for by new laws. Sometimes the new conditions affect the members of a class. If so, the correcting statute must apply to all alike. Sometimes the new conditions affect one only or a few. If so the correcting statute may be as narrow as the mischief. The Constitution does not prohibit special laws inflexibly and always. It permits them when there are special evils with which existing general laws are incompetent to cope. The special public purpose will then sustain the special form. Baltimore v. United R. & Electric Co. 126 Md. 39. 94 At. 378, supra. The problem in last analysis is one of legislative policy, with a wide margin of discretion conceded to the lawmakers. * * *

Consequently, in light of the foregoing authorities, we are persuaded to the view that Senate Bill No. 102 is not a local or special law in violation of any constitutional provisions prohibiting this type of legislation.

Senate Bill No. 102 is not violative of Article I, Section

10 of the Constitution of the United States or Article I, Section

13 of the Constitution of Missouri, 1945, as an impairment of
the obligation of contracts between municipalities and the State.

In the event that Senate Bill No. 102 becomes part of a statutory law of Missouri, the question arises as to its effect upon contractual obligations of cities covered by the act. At the present time there is a contract between the City of St. Louis (a city of more than 600,000 inhabitants) and the State Highway Commission, providing for the acquisition of a right-of-way, construction of a highway, maintenance and regulation of traffic thereon, in the corporate limits of the City of St. Louis. Senate Bill No. 102 would stay certain actions contemplated under this contract for a period of two years next after the effective date thereof.

In connection with this we must determine whether or not this would be a violation of Article I, Section 10 of the Constitution of the United States, which is, in part, as follows:

"No State shall * * * *pass any Law impairing the Obligation of Contracts * * * *

The leading case concerning the right of a state to abrogate a contract of one of its political subdivisions is City of Trenton v. New Jersey, 262 U.S. 182, 67 L. Ed. 937, 43 S. Ct. 534, 29 A. L.R. 1471. In the course of its opinion the court said, 1.c. 941:

"As said by this court, speaking through Mr. Justice Moody, in Hunter v. Pittsburg, 207 U.S. 161, 178, 179, 52 L. Ed. 151, 159, 160, 28 Sup. Ct. Rep. 40;

"The number, nature, and duration of the powers conferred upon these corporations and the territory over which they shall be exercised rests in the absolute discretion of the state. Neither their charters nor any law conferring governmental powers, or vesting in them property to be used for governmental purposes, or authorizing them to hold or manage such property, or exempting them from taxation upon it, constitutes a contract with the state within the meaning of The Federal Constitution. The state, therefore, at its pleasure, may modify or withdraw all such powers, may take without compensation such property, hold it itself, or vest it in other agencies, expand

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or contract the territorial area, unite the whole or a part of it with another municipality, repeal the charter, and destroy the corporation. All this may be done, conditionally or unconditionally, with or without the consent of the citizens, or even against their protest. In all these respects, the state is supreme; and its legislative body, conforming its action to the state Constitution may do as it will, unrestrained by any provision of the Constitution of the United States The power is in the state, and those who legislate for the state are alone responsible for any unjust or oppressive exercise of it.

* * * * * * * *

"In the absence of state constitutional provisions safeguarding it to them, municipalities have no inherent right of self-government which is beyond the legislative control of the state. A municipality is merely a department of the state, and the state may withhold, grant, or withdraw powers and privileges, as it sees fit. However, great or small its sphere of action, it remains the creature of the state, exercising and holding powers and privileges subject to the sovereign will. See Barnes v. District of Columbia, 91 U.S. 540, 544, 545, 23 L. ed. 440, 441.

* * * * * * * * *

"The power of the state, unrestrained by the contract clause or the 14th Amendment, over the rights and property of cities held and used for 'governmental purposes,' cannot be questioned. In Hunter v. Pittsburg, supra, 179, reference is made to the distinction between property owned by municipal corporations in their public and governmental capacity and that owned by them in their private or proprietary capacity, and decisions of this court which mention that distinction are referred to. In none of these cases was any power, right,

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or property of a city or other pelitical subdivision held to be protected by the contract clause or the lith Amendment. This court has never held that these subdivisions may invoke such restraints upon the power of the state.

"In East Hartford v. Hartford Bridge Co. 10 How. 511, 533, 534-536, 13 L. ed. 518, 527-529, it appeared that, for many years, a franchise to operate a ferry over the Connecticut river belonged to the town of Hartford; that, upon the incorporation of East Hartford, the legislature granted to it one half of the ferry during the pleasure of the general assembly, and that subsequently, after the building of a bridge across the river, the legislature discontinued the ferry. It was held that this was not inconsistent with the contract clause of the Federal Constitution. The reasons given in the opinion (pp. 533, 534) support the contention of the state here made, that the city cannot possess a contract with the state which may not be changed or regulated by state legislation."

(Underscoring ours.)

In a previous case, City of Pawhuska v. Pawhuska Oil and Gas Company, 250 U.S. 394, 63 L. Ed. 1054, 39 S. Ct. 526, the Supreme Court had declared the principle of law that the action of a state in abrogating a contract of a municipality does not violate Article I, Section 10 of the Constitution of the United States.

The following later cases were dismissed in the Supreme Court of the United States for the reason that no Federal question was involved: City of Tulsa v. Oklahoma Natural Gas Company, 4 Fed. (2d) 399, App. Dis. 269 U.S. 527, 70 L. Ed. 395, 46 S. Ct. 17; Board of County Commissioners of Barber County, Kansas, v. Carl J. Peterson, et al., 113 Kan. 180, 213 P. 1054, App. Dis. 266 U.S. 591, 69 L. Ed. 457, 45 S. Ct. 194; Twin Falls County, Idaho, v. Marie Henderson, 59 Ida. 97, 80 P. (2d) 801, App. Dis. 305 U.S. 569, 83 L. Ed. 358, 59 S. Ct. 149; Williams v. Baltimore, 289 U.S. 36, 77 L. Ed. 1015, 53 S. Ct. 431. In all of the above cases the court cited, among others, the cases of City of Trenton and City of Pawhuska, supra, as grounds for its refusal to take jurisdiction of the case.

On the same day that the decision of the court was announced

in the City of Trenton case, supra, the Supreme Court of the United States also decided the case of City of Newark v. State of New York, 262 U.S. 192, 67 L. Ed. 943, in which the court said, 1.c. 946:

"* * *The city cannot invoke the protection of the lith Amendment against the state. * * *"

See also Neunschwander v. U. Suburban Sanitary Commission, et al., 189 Md. 74, 48 Atl. (2d) 593; Town of Brighton v. Town of Charleston, 114 Vt. 322, 44 Atl. (2d) 632; Brooklyn and Richmond Ferry Company v. United States, 167 Fed. (2d) 330, Annotations in 90 A.L.R. 688 and 116 A.L.R. 1037.

By the decisions in the Trenton and Pawhuska cases, supra, the Supreme Court of the United States has well established the legality of a state's action in abrogating a contract entered into by a municipality which is a political subdivision of the state.

The section of the Missouri Constitution prohibiting the enactment of any law impairing the obligation of contracts contains substantially similar language to that in the United States Constitution which has been discussed supra.

Article I, Section 13 of the Constitution of Missouri, 1945, reads as follows:

"That no ex post facto law, nor law impairing the obligation of contracts, or retrospective in its operation, or making any irrevocable grant of special privileges or immunities, can be enacted."

The same reasoning which was applied in the cases under the Federal Constitution is also applicable in this discussion of the possibility of conflict with the Missouri Constitution. In the case of City of St. Louis v. Public Service Commission, et al., 276 Mo. 509, 207 S.W. 799, there was in existence a contract between United Railways Company of St. Louis and that City providing for certain fares to be collected from passengers on the street railways' lines. Thereafter, the United Railways Company filed with the Public Service Commission a petition asking that it be allowed to charge a reasonable compensation for the service it rendered the public in operating its street railways in the City of St. Louis. The city interposed as a defense Section 20 of

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Article XII of the Constitution of 1875, which read as follows:

"'No law shall be passed by the General Assembly granting the right to construct and operate a street railroad within any city, town, village, or on any public highway, without first acquiring the consent of the local authorities having control of the street or highway proposed to be occupied by such street railroad; and the franchise so granted shall not be transferred without similar assent first obtained."

In its opinion the court held that until the Legislature acted the city could impose, among others, limitations concerning fares to be charged, but it held further that Section 20 of Article XII did not prohibit action by the Legislature under its police power in the regulation of rates. At 1. c. 526 the court said:

"If I am correct in the foregoing conclusion, then the Legislature had the undoubted authority under the police power of the State to increase or decrease those fares as it deems proper or to authorize the Public Service Commission to do the same. The following cases so hold: State ex rel. v. Public Service Commission, 275 Mo. 201; City of Fulton v. Public Service Commission, 275 Mo. 67; Public Utilities Commission v. Railroad, 275 Ill. 555, 570; Chicago v. O'Connell, 278 Ill. 591; Atlantic Coast Electric Ry. Co. v. Commission, 104 Atl. 218; Collingswood Sewerage Co. v. Collingswood, 102 Atl. 901; Salt Lake v. Light & Traction Co., 173 Pac. (Utah) 556.

"And this is true whether the franchise ordinance mentioned is considered as a contract or a regulation enactment; it having been enacted and agreed to subject to the police power of the State, it must give way upon the exercise of that power by the Legislature or by its duly authorized agent, the Public Service Commission; and it having acted the ordinance or contract, as

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you may deem it, must give way to the extent hereinbefore stated. (State ex rel. v. Public Service Commission, 275 Mo. 201; City of Fulton v. Public Service Commission, 275 Mo. 67.)"

In the case of Southwest Missouri R. Co. v. Public Service Commission, 219 S.W. 380, 281 Mo. 52, the court discussed the ruling in the case above, and at 1.c. 381 said:

" * * * It was also held that section 20 of Article 12 of the Constitution, to wit: * * * did not, in terms nor by necessary intendment, devolve upon the municipalities therein mentioned any part of the unrestricted power of the Legislature to deal with all matters pertaining to the police power of the state where not constitutionally prohibited from so doing.

"In the exercise of this great lawmaking function, the state is not obstructed by a contract between one of its agencies (cities, towns, or villages) and other persons, for the reason that the state cannot alienate any of its sovereign powers which are necessary to the public welfare, or essential to the protection of the health, morals, and property of its citizens. * * *"

The relationship of municipalities to the state was discussed at length in the case of Harris v. Bond Co., 244 Mo. 664, wherein the court said, 1. c. 688:

"It is the consensus of opinion in this country that the Legislature in the creation of municipal and public corporations of every description is absolute and unlimited, in the absence of some specific State or Federal constitutional provision restricting such powers.

"The Legislature is vested with the whole power of the State in the absence of some such constitutional limitation; and may establish any public or municipal corporation it deems necessary or expedient in the public interest.

"It may also confer upon such corporations such public power and authority as it may deem wise and best. Moreover, it may not

only create such public corporations, but it may also change, divide and abolish them at pleasure.

"Judge Dillon, in discussing this subject said: 'Subject to the constitutional limitations presently to be noticed, the power of the Legislature over such corporations is supreme and transcendent; it may, where there is no constitutional inhibition, erect, change, divide and even abolish them at pleasure, as it deems the public good to require. (1 Dillon, on Municipal Corporations (5 Ed.), Sec. 92, p. 142.) Parliament may create new corporations, or abolish or alter charters, or impose new ones, at its will and without the consent of the inhabitants. And so may the State Legislatures in this country, if there be no constitutional restriction upon the power. (1 Dillon, on Municipal Corporations (5 Ed.), Sec. 108, p. 181.)

"'A municipal corporation is, so far as its purely municipal relations are concerned, simply an agency of the State for conducting the affairs of government, and as such it is subject to the control of the Legislature. That body may place one part of the State under one municipal organization and another part of the State under another organization of an entirely different character.' (Williams v. Eggleston, 170 U.S. 310, per Mr. Justice Brewer.)

"These corporations are bodies politic; created by laws of the State for the purpose of administering the affairs of the incorporated territory. They exercise powers of government, which are delegated to them by the Legislature, and they are subjected to certain duties. They are the auxiliaries, or the convenient instrumentalities, of the general government of the State for the purpose of municipal rule The whole interests are the exclusive domain of the government itself and the power of the Legislature over them is supreme and transcendent; except as restricted by the Constitution of the State. Their charters being granted for the better government of the particular districts,

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the right to insert such provisions as seem to best subserve public interests would seem, from the very nature of such institutions, to be inherent. (MacMullen v. Middletown, 187 N. Y. 42, per Gray, J.)"

In the early case of The State ex rel. v. St. L., K. C. & N. Ry. Co., 9 Mo. App. 532, the court had for its consideration a statute annulling a tax assessment by a city and vesting the power to make the assessment for the year in question to another body. In its opinion the court said, 1.c. 537:

"* * * The creation of municipal corporations, says Mr. Justice Cooley, and the conferring upon them of certain powers and subjecting them to corresponding duties, does not deprive the legislature of the State of that general control over their citizens which was before possessed. It still has authority to amend their charters, enlarge or diminish their boundaries, consolidate two or more into one, overrule their legislative action whenever it is deemed unwise, impolitic, or unjust, and even abolish them altogether, in the legislative discretion. Cooley's Const. Lim. 192, citing many cases. See St. Louis v. Allen, 13 Mo. 400, 412; St. Louis v. Russell, 9 Mo. 507. 'The powers conferred on municipalities, ' says Wagner, J., 'are subordinate to the powers of the Legislature over the same subject, and the latter will never be presumed to have abdicated their right to exercise these powers unless it is plainly so stated, or there is a necessary inconsistency between the two enactments.' The State v. Harper, 58 Mo. 531. 'The city,' said the same learned judge in another case, 'can only raise money and apply it to a particular purpose by virtue of a delegated authority, and the same authority that grants the power may alter the law and divert it to a different object.' St. Louis v. Shields, 52 Mo. 354. * * *

"It will be seen from the second section of the act that it is in express terms retrospective. * * * "Nor is there force in the plaintiff's position that this statute, if held to be retrospective, is in conflict with sect. 15 of the Bill of Rights, which prohibits the Legislature from passing any law retrospective in its operation. Provisions of this kind exist, it is believed, in the constitutions of all the States, and they are generally held to extend only to the prohibiting of legislation of a retrospective character which disturbs rights of a private nature. If a controlling authority on this point is needed, it will be found in the case of The State ex rel. v. County Court, 34 Mo. 546, 571."

In the case of State v. Wellston Sewer Dist., 58 S.W. (2d) 988, there was a proceeding in mandamus to compel the respondent Board of Supervisors of the Wellston Sewer District of St. Louis County to proceed with the organization thereof in accordance with the provisions of a statute enacted in the year 1927. The act was repealed in 1931. During the intervening four years certain steps had been taken toward the organization of the district. but with the repeal of law under which it was created the Board of Supervisors refused to go further. The relators, who were property owners, contended that the organization had progressed to a point such as gave them a vested right to have the sewer project carried out and that right was violated by the repealing statute. One of the objections of relators' to the constitutionality of the repealing act was that they claimed to have a contract right requiring the execution of the sewer plan which the repealing act impaired in violation of Section 15 of Article II of the State Constitution. In its opinion the court said. 1.c. 992:

"The state has the power to enforce reasonable police regulations measurably affecting the liberties of people not alone with respect to their personal conduct and rights, but with respect to the use and enjoyment of their property as well—and this without the allowance of compensation for such restrictions. As against these regulations the people have no vested rights, no constitutional immunity by contract or otherwise. Thus it was held in State ex rel. Cadillac Co. v. Christopher, 317 Mo. 1179, 298 S.W. 720, that the zoning

law of the city of St. Louis was constitutional though landowners were left uncompensated. Bellerive Inv. Co. v. Kansas City, 321 Mo. 969, 13 S.W. (2d) 628, 634, ruled an ordinance forbidding the keeping of more than three automobiles in any building below quarters used for living or sleeping purposes did not deprive the property owner of 'any right or privilege guaranteed by the Constitution, state or federal. And in Kingshighway Presbyterian Church v. Sun Realty Co., 324 Mo. 510, 24 S.W. (2d) 108, 110, involving a St. Louis city ordinance which prohibited the location of a gasoline filling station within 250 feet of a church, this court said 'every citizen holds his property subject to the valid exercise of the police power, and on that theory declared a building permit issued before the ordinance went into effect gave the defendant no vested right to build the station, although he had contracted for the erection thereof, purchased material, and commenced work. The rule has been expressly applied to contract rights. * * *"

In its discussion of the Wellston Sewer District case, supra, the Supreme Court of Missouri cited as one authority for its holding constitutional the repealing act referred to above the language of the Supreme Court of the United States in Hunter v. City of Pittsburg, 207 U. S. 161, 178, 179, 28 S. Ct. 40, 46, 52 L. Ed. 151, 159. The greater part of that quote is contained in this opinion in the discussion of the City of Trenton case in connection with the contract clause of the Constitution of the United States.

Therefore, under the authority of the above cases, we believe the enactment into law of Senate Bill No. 102 is not violative of Article I, Section 10 of the Constitution of the United States or Article I, Section 13 of the Constitution of Missouri, 1945, as an impairment of the obligation of contracts between municipalities and the State. Hon. Forrest Smith

Senate Bill No. 102 is not an impairment of the obligation of contracts between the Federal Government and the State.

The question next presents itself as to whether Senate Bill No. 102 violates the provisions of the Federal and State Constitutions relating to the impairment of the obligation of contracts insofar as any contracts between the Federal Government and the State are concerned.

It is true that a contract or agreement entered into between the United States and a State is a contract within the meaning of the constitutional provisions so that a state law may not impair the obligation thereof. McGhee v. Mathis, 18 L. Ed. 314, 4 Wall. 143; State ex rel. Boynton v. Kansas State Highway Commission (Kans.), 32 Pac. (2d) 493; Johnson v. McDonald (Colo.), 49 Pac. (2d) 1017.

As pointed out in the statement of facts in the first part of this opinion, there has been no agreement or contract signed or executed by the Public Roads Administration and the State Highway Commission insofar as acquisition of the right-of-way and the construction of the highway are concerned. It is true that programs of proposed projects and project statements have been approved insofar as to these two matters are concerned. However, Section 1.9 of the Regulations of the Public Roads Administration of the Federal Works Agency provides, in part, as follows:

" * * * A project agreement between the State highway department and the Commissioner shall be executed for each project on a form furnished by the Commissioner. No payment on any project shall be made by the United States unless and until such agreement has been executed, or nor on account of costs incurred prior to authorization by the authorized representative of the Commissioner." Hon. Forrest Smith

The Federal-Aid Highway Act of 1944 (58 Stat. 838) provides, in part, as follows:

" * * * As soon as the funds for each of the post-war fiscal years have been apportioned, the Commissioner of Public Roads is authorized to enter into agreements with the State highway departments for the making of surveys and plans, the acquisition of rights-of-way, and the post-war construction of projects. His approval of any such agreement shall be a contractual obligation of the Federal Government for the payment of its pro rata share of the cost of construction: * * *"

Under the above regulation and statute there is no contractual obligation between the parties nor may any monies be paid by the Federal Government until such a project agreement has been entered into and signed. As pointed out in the first part of this opinion, Senate Bill No. 102 relates only to property that has been acquired by the state or city, and only delays the construction of such highway, and does not, in any way, affect the condemnation or other acquisition of such property. Therefore, because there is no contract now in existence between the Federal Government and the State relating to the actual construction of the highway, there can be no obligation of contract impaired by Senate Bill No. 102.

The right of a state to enact laws under the police

power in emergencies has always been upheld by the courts of

the United States and the states.

The courts of the United States and of the states have invariably held as being not violative of constitutional provisions laws enacted under the police powers of a state when emergency conditions exist.

The United States Supreme Court, in the case of Home Bldg. & L. Assn. vs. Blaisdell, 290 U.S. 398, 78 L. ed. 413, 54 S. Ct. 231, 88 A.L.R. 1481, upheld a moratory statute enacted by the State of Minnesota during the chaotic economic period of the 1930's, which statute, during a limited period of time, provided relief from mortgage foreclosures, postponed execution sales of real estate and extended periods of redemption. The court said, 1.c. 434:

"Not only is the constitutional provision qualified by the measure of control which the State retains over remedial processes, but the State also continues to possess authority to safeguard the vital interests of its people. It does not matter that legislation appropriate to that end 'has the result of modifying or abrogating contracts already in effect. Stephenson v. Binford, 287 U.S. 251, 276 . Not only are existing laws read into contracts in order to fix obligations as between the parties, but the reservation of essential attributes of sovereign power is also read into contracts as a postulate of the legal order. The policy of protecting contracts against impairment presupposes the maintenance of a government by virtue of which contractual relations are worth while, -- a government which retains adequate authority to secure the peace and good order of society. This principle of harmonizing the constitutional prohibition with the necessary residuum of state power has had progressive recognition in the decisions of this Court."

In the case of People vs. La Fetra, 130 N.E. 601, 230 N.Y. 429, the Court of Appeals of New York upheld as constitutional the acts of the Legislature of New York, applying to the City of New York, known as the "September housing laws,"

which laws prohibited eviction of tenants in Greater New York for a limited period when fair rent was paid. The court said, 1.c. 604:

"Whether or not a public emergency existed was a question of fact, debated and debatable which addressed itself primarily to the Legislature. That it existed, promised not to be presently self-curative, and called for action, appeared from public documents and from common knowledge and observation. If the lawmaking power on such evidence has determined the existence of the emergency and has, in the main, dealt with it in a manner permitted by the constitutional limitations upon legislative power, so far as the same affect the class of landlords now challenging the statutes, the legislation should be upheld. How it may operate on other classes or individuals not before the court is not our present concern. The relator comes indisputably within the main purpose of the statutes, but it has no standing to . raise questions which do not directly affect it. Arizona Employers' Liability Cases, 250 U.S. 400, 409, 39 Sup. Ct. 553, 63 L. Ed. 1058, 6 A.L.R. 1537. * * * *

The court further said, 1.c. 608:

"Laws directly nullifying some essential part of private contracts are rare, and are not lightly to be upheld by hasty and sweeping generalizations on the common good (Barnitz v. Beverly, supra; Bradley v. Lightcap, 195 U.S. 1, 24 Sup. Ct. 748, 49 L. Ed. 65); but no decision upholds the extreme view that the obligation of private contracts may never be directly impaired in the exercise of the legislative power. No vital distinction may be drawn between the exercise in times of emergency of the police power upon the property right and upon the contract obligations for the promotion of the public weal. * * * "

The same court said in the case of Guttag vs. Shatzkin, 130 N.E. 929, 230 N.Y. 647, at 1.c. 930:

"While the states are subject to the contract clause of section 10, article 1, and section

1, article 14, of the United States Constitution, the police power of the states may affect contracts and modify property rights without violation of these provinces. Conceding the health, safety, and morals of its citizens to be involved, and the circumstances to justify a proper interference by the state, neither the contract nor due process of law clause stand in the way. Union Dry Goods Co. v. Georgia Public Service Corporation, 248 U.S. 372, 39 Sup. Ct. 117, 63 L. Ed. 309, 9 A.L.R. 1420. These sections of our federal Constitution and the police power of the state harmonize and never conflict. The only question here is one of fact, not one of law: Do the facts call into existence the power reserved to the states to legislate for the safety and health of the people? Within its sphere the police power of the states is not unlike the war power of the nation. Both are rules of necessity, impliedly or expressly existing in every form of government; the one to preserve the health and morals of a community; the other to preserve sovereignty."

(Emphasis ours.)

The United States Supreme Court upheld the New York housing laws in the case of Levy Leasing Co. vs. Siegel, 258 U.S. 242, 42 S. Ct. 289, 66 L. ed. 595, the court said, 1.c. 245:

"The warrant for this legislative resort to the police power was the conviction on the part of the state legislators that there existed in the larger cities of the State a social emergency, caused by an insufficient supply of dwelling houses and apartments, so grave that it constituted a serious menace to the health, morality, comfort and even to the peace of a large part of the people of the State. That such an emergency, if it really existed, would sustain a resort, otherwise valid, to the police power for the purpose of dealing with it cannot be doubted, for, unless relieved, the public welfare would suffer in respects which constitute the primary and undisputed, as well as the most usual, basis and justification for exercise of that power.

* * * * * * * * * * *

Honorable Forrest Smith

"If this court were disposed, as it is not, to ignore the notorious fact that a grave social problem has arisen from the insufficient supply of dwellings in all large cities of this and other countries, resulting from the cessation of building activities incident to the war, nevertheless, these reports and the very great respect which courts must give to the legislative declaration that an emergency existed would be amply sufficient to sustain an appropriate resort to the police power for the purpose of dealing with it in the public interest."

In Evanston vs. Wazau, 364 Ill. 198, 4 N.E. (2d) 78, the Court said:

"* * * In the exercise of this power (police power) the Legislature may enact laws regulating, restraining, or prohibiting anything harmful to the welfare of the people, even though such regulation, restraint, or prohibition interferes with the liberty or property of an individual. Neither the Fourteenth Amendment to the Federal Constitution nor any provision of the Constitution of this state was designed to interfere with the police power to enact and enforce laws for the protection of the health, peace, safety, morals, or general welfare of the people. Fenske Bros. v. Upholsterers' Union, 358 Ill. 239, 193 N.E. 112, 97 A.L.R. 1318; People v. Anderson, 355 Ill. 289, 189 N. E. 338. 特兴林。11

(Words in parenthesis ours.)

CONCLUSION

In view of the above authorities it is the opinion of this department that Senate Bill No. 102 is not violative of any provisions of the Constitution of the State of Missouri or the Constitution of the United States.

Respectfully submitted,

APPROVED:

RICHARD F. THOMPSON Assistant Attorney General PROBATE COURT)

Probate clerks may not received increased corpensation based upon increased valuation during term of Probate Judge.

November 9, 1949

11/10/49

Honorable O. L. Spencer Judge of Probate Scott County Benton, Missouri



Dear Sir:

Reference is made to your request for an official opinion of this Department, reading as follows:

"When I took office as Probate Judge on Jamuary 1st, 1947, the population of this County was in excess of 30,000 and the assessed valuation was less than 18 million dollars, which fixed the salary of the Probate Judge under section 2 of the Laws of 1945 at \$3600.00, and Section 5 of said Laws provided that not more than \$1200.00 be spent for Clerk hire.

"Section 5 was amended in 1947 and shown at pages 361 and 362, Volume 2 of the Laws of 1947.

"The assessed valuation of the County has now increased to more than 18 million, which increases the amount that can be paid for Clerk hire to \$1800.00, and I would like an opinion as to whether I am permitted to pay more for Clerk hire at this time, as the \$1200.00 is inadequate."

The act referred to in your letter is found Laws of Missouri, 1945, at page 1514. The amendment found Laws of Missouri, 1947, Volume II, page 361, is immaterial insofar as the question you have proposed is concerned.

Section 2 of the act mentioned reads in part as follows:

"The annual salary of probate judges in counties now or hereafter having more than 30,000 and less than 70,000 inhabitants, shall be as follows:

"(a) In counties with an assessed valuation of \$18,000,000 or less, the sum of\$3600.00

"For the purpose of this Act, the assessed valuations of all property in the respective counties, as last determined by the commission or other body provided by law for the equalization of taxes as between the counties next prior to the election of such judges, shall be deemed to be the assessed valuations for the ensuing terms of such judges."

(Underscoring ours.)

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Section 5 of the same act reads in part as follows:

" * * * In all counties now or hereafter having more than 30,000 and less than 70,000 inhabitants, the total salaries of all clerks, assistants and stenographers in the probate court for any one calendar year shall not (a) in counties with an assessed valuation of \$18,000,000 or less exceed the sum of \$1200.00; * * *"

We have emphasized a portion of Section 2 as we feel that the limitation contained therein is applicable to both the section in which it is found and also to Section 5. We so believe because of the specific incorporation of the phrase, "for the purpose of this act," since both sections hereunder discussion were adopted simultaneously, being Senate Committee Substitute for Senate Bill No. 198 of the Sixty-third General Assembly.

From the foregoing we reach the conclusion that an increase in valuation of the county during the term of a probate judge will not serve to authorize increased payments for clerical assistance.

Your attention is also directed to an official opinion of this office delivered under date of August 6, 1949, to the Honorable Howard B. Lang, Jr., Prosecuting Attorney of Boone County, a copy of which is attached hereto.

CONCLUSION.

In the premises we are of the opinion that increased payments

Hon. O. L. Spencer

for clerical assistance may not be made during the term of a probate judge, even though the assessed valuation of the county may increase to such an extent that a greater amount may be paid during the succeeding term.

Respectfully submitted,

APPROVED:

WILL F. BERRY, JR. Assistant Attorney General

J. E. TAYLOR Attorney General

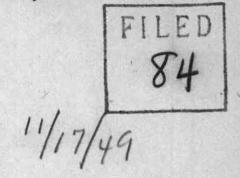
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Enclosure

FIRE PROTECTION DISTRICTS:

Upon incorporation of a city wholly within a fire protection district the property within the city remains subject to the jurisdiction and taxation of the fire protection district.

November 16, 1949



Honorable Floyd L. Snyder Member of House of Representatives 521 South Noland Road Independence, Missouri

Dear Mr. Snyder:

I.

We hereby acknowledge receipt of the following request for an opinion from this department.

"At the present time, the village of Raytown, Jackson County, an unincorporated community, is wholly within the Raytown Fire District. This community is seeking incorporation. Under House Bill No. 7, an act of the 65th General Assembly, approved June 2, 1949, "if any property located within the boundaries of a fire protection district in a county of the first class now or hereafter having a population of 450,000 inhabitants or more, is now or hereafter included with a city not wholly within such district, such property is excluded from the district."

"Upon incorporation of the community of Raytown, under the provisions of House Bill No. 7, would the Raytown Fire District be dissolved?"

II.

Laws of Missouri, 1947, pages 432 to 451, inclusive, provide for the organization and operation of fire protection districts in class one counties. Section 2 of said Act provides in part as follows:

"A fire protection district is one to supply protection against fire by any available means. Such district must be wholly within a county of Class One, must consist of contiguous tracts or parcels of property, and may include within its boundaries, or may be contiguous with any city, town or village."

Hon. Floyd L. Snyder

House Bill No. 7, of the 65th General Assembly approved June 2, 1949, amends the fire protection district law in the following respects:

"Section 32a. If any property, located within the boundaries of a fire protection district in a county of the first class now or hereafter having a population of 450,000 inhabitants or more, is now or hereafter included with a city not wholly within such district, such property is excluded from the district."

The action of the 65th General Assembly shows that the Legislature intended to change the provisions of Section 2 to make it clear that property within the city that was not wholly within an organized fire protection district would not be included within the jurisdiction of said district because the sentence "and may include within its boundaries, or may be contiguous with any city, town or village" was not clear as to whether or not a fire district might be organized to include part of a city.

The word contiguous means actual contact, touching or adjoining. A fire protection district may adjoin the city limits of any city, town or village.

The word wholly means fully, totally, completely, solely or exclusively. If the village of Raytown in Jackson County, Missouri, a class one county, is incorporated and its city limits are wholly and entirely within the Raytown Fire Protection District then the property that would be within the city limits of the new incorporated city of Raytown would continue to be subject to the jurisdiction and taxation of the previously organized Raytown Fire Protection District because said new organized city would be exclusively and completely within said fire district and would not be a city not wholly within such district as contemplated in said House Bill No.

III.

CONCLUSION

It is the opinion of this office that the property within the now existing Raytown Fire Protection District that would be within the city limits of the city of Raytown upon its incorporation, would remain subject to the jurisdiction and taxation of said fire district if the city of Raytown was wholly or completely within the territorial limits of said Raytown Fire Protection District.

Respectfully submitted,

74 ...

STEPHEN J. MILLETT Assistant Attorney General

APPROVED:

J. E. TAYLOR Attorney General

SJM:my/

COUNTY TREASURER EX Officio collector-)
TOWNSHIP FORM OF GOVERNMENT

County Treasurer, ex officio collector in county under township organization can not procure payment of deputy collector out of a county general revenue.

January 27, 1949

FILED 86

Honorable Christian F. Stipp Prosecuting Attorney Carroll County Carrollton, Missouri

Dear Mr. Stipp:

PAYMENT OF DEPUTY COLLECTOR

We have your letter of January 17, 1949, in which you request an opinion of this department. Your letter is as follows:

"The opinion of your office on the following question is respectfully requested:

Carroll County has a population of barely over 17,000, is a third class county and operates under township organization with a County Treasurer and Ex Officio Collector. The total taxes assessed and levied in this county approximate \$650,000. The County Treasurer and Ex Officio Collector has included in his budget of estimated expenditures for the year 1949, an item to be paid to him for deputy or clerical hire.

Question: In a county operating under township organization is the County Court authorized to appropriate out of the County funds a monthly sum to be paid to the County Treasurer and Ex Officio Collector and to be used by him for deputy or clerical hire?

Most requests, I presume, are for an immediate opinion. We would appreciate it very much if we could be advised of your opinion by January 28th, so that the county budget of estimated expenditures might be timely and properly filed by February 1st."

Honorable Christian F. Stipp - 2 -

We have considered the question presented in the light of the statutes and the available court decisions, and find that the only section authorizing collectors to appoint deputies is section 11067, R.S.A. Mo. 1939. The substance of said section is that a collector may appoint deputies by an instrument in writing. The section also defines the duties and powers of a deputy with which definition we are not concerned in this opinion.

The question as to whether or not a treasurer and ex officio collector in a township organization county has a right to appoint a deputy under this section has not been passed upon by the Supreme Court of this State, that Court having mentioned the question in Alexander vs. Stoddard County, 210, S.W. (2nd) 107, but having failed to rule thereon. However, such is not your question, because as shown by your letter above quoted, your specific question is whether or not the county court has authority to appropriate out of the county funds monthly sums to be paid to county treasurer to be used by him to hire a clerk or deputy.

We are of the opinion that if a county treasurer and ex officio collector can hire a clerk or deputy at all, that clerk or deputy must be appointed under the authority of section 11067, supra, but we are not passing on the question as to whether or not such an official can appoint a deputy by authority of said section for the two-fold reason that the Supreme Court in Alexander vs. Stoddard County, supra, mentioned said question without passing upon it, and that your above quoted letter does not request an opinion on that specific question.

If, however, it should be assumed that a county treasurer and ex officio collector in a county operating under a township organization plan does have authority under said section to appoint a deputy or clerk, we are of the opinion that said deputy or clerk can not be paid out of the general revenue of the county, but must be paid out of the fees earned by the collector according to law.

In this connection we direct your attention to

Honorable Christian F. Stipp - 3 -

the following quoted language from section 11107, R.S.A. Mo. 1939:

"* * * but such deputy and/or elerical hire shall be peyable out of fees and commissions earned and collected by such officer only and not from general revenue."

In Alexander vs. Stoddard County, 210 S.W. (2nd) 107, the facts were that Clyde Alexander, the county clerk and ex officio collector of Stoddard County, a county operating under the township form of government, employed a clerk to assist him in his work as collector and advanced the money to pay said clerk, and then sought to recover the amount expended from the general revenue fund of the county.

The Supreme Court of Missouri held that this money, if paid, must be paid from the fees earned by Alexander in the performance of his duty as collector, and not from the general revenue. In so holding, the Court cited section 11107, R.S.A. Mo. 1939, supra. The following is a quotation from the opinion of the Court:

"Furthermere, those statutes provide
That the officers referred to in section 11106, in addition to the maximum
amount of fees and commissions permitted
to be retained by county collectors * * *
each such officer may retain for the payment of deputy and/or clerical hire a sum
not to exceed twenty-five per cent of the
maximum amount of fees and commissions
which such officer is permitted to retain
by said section as so amended, but such
deputy and/or clerical hire shall be
payable out of fees and commissions earned
and collected by such officer only and not
from general revenue." Mo. R.S.A. 11107.
The precise question is not before us and
for that reason we do not pass upon whether
these sections authorize deputies for ex
officio collectors in counties under township organization. But whether they do or do

Honorable Christian F. Stipp - 4 -

not authorize such deputies, they plainly indicate the source of their pay and limit it to 'fees and commissions earned and collected by such officer only and not from general revenue."

CONSLUSION

We are accordingly of the opinion that the county court of Carroll County can not rightfully appropriate out of the county funds a monthly sum to be paid the county treasurer and ex officio collector to be used by him for deputy or clerical hire.

Respectfully submitted,

APPROVED:

SAMUEL M. WATSON Assistant Attorney General

J. E. TAYLOR Attorney General COUNTY JUDGES:

Judges of county courts in counties of the Third Class, when acting as board of equalization, shall receive no mileage fee for travel to or from meetings of such board.

August 5, 1949

8/10/49

Honorable Christian F. Stipp Prosecuting Attorney Carroll County Carrollton, Missouri



Dear Sir:

In reply to your letter of August 2, 1949, requesting an opinion of this department, which reads as follows:

"When members of the County Court in Counties of the third class meet as members of the Board of Equalization, but not as a County Court, are they entitled to mileage in traveling to and from such meeting of the Board of Equalization."

The statutes now in effect relating to compensation and mileage allowance of judges of the county court of third class counties are sections 2494.3 and 2494.4, No. R.S.A. (L. 1945, p. 1538), which provide as follows:

Sec. 2494.3

"In all counties of the third class in this state, the judges of the county court shall receive for their services the sum of ten dollars per day for each of the first five days in any month that they are necessarily engaged in holding court and shall receive five dollars per day for each additional day in any month that they may be necessarily engaged in holding court, and shall receive five cents per mile

for each mile necessarily traveled in going to and returning from the place of holding county court. The per diem compensation herein fixed shall be paid at the end of each month and the mileage compensation shall be paid at the end of each month on presentation of a bill, by each of the respective county judges setting forth the number of miles necessarily traveled: provided, however, that this increase in compensation shall not become effective during any county judge's present term of office."

Sec. 2494.4

"In addition to the compensation provided in Section 1 of this act, the judges of the county court in counties of the third class shall receive five dollars per day for each day they shall act as members of the county board of equalization."

Section 2494.3 Mo. R.S.A. stipulates the rate of compensation to be allowed to judges of the county court and a part of this compensation is a mileage fee to be received "for each mile necessarily traveled in going to and returning from the place of holding county court." The words appearing in section 2494.4 Mo. R.S.A., "In addition to the compensation provided in section 1, of this act" (i.e. Section 2494.3 Mo. R.S.A.), cannot be interpreted to mean "in addition to part of the compensation allowed", (i.e. the per diem compensation only), but must refer to the entire compensation allowed, (i.e. both the per diem and the mileage allowance), and can only be interpreted to mean that in addition to the total compensation allowed to judges of the county court while holding county court, they shall be allowed additional compensation of five dollars per day while acting as

members of the county board of equalization.

Applying the rule of statutory construction, which states that the intent of the legislature must be ascertained and given effect, we can find no intention on the part of the General Assembly to allow any mileage fee to members of the county court while acting as members of the county board of equalization. Section 2494.3, Mo. R.S.A. provides a mileage fee "for each mile necessarily traveled in going to and returning from the place of holding court," and it seems clear and unambiguous that no such fee is provided to judges of the county courts while acting as members of the county board of equalization for travel to or from the meetings of such board.

CONCLUSION.

The members of the county court in counties of the third class are not entitled to a mileage fee while acting as members of the county board of equalization for travel to, or from the meetings of such board.

Respectfully submitted,

JOHN E. MILLS, Assistant Attorney General

APPROVED:

J. E. TAYLOR Attorney General OFFICERS: Sheriffs required to receive into county jail persons arrested without warrant.

Bail Bond Sheriffs not suthorized to fix bail of persons arrested without warrant.

October 5, 1949

10/21/49

Honorable H. K. Stumberg, Prosecuting Attorney, St. Charles County, St. Charles, Missouri FILED 86

Dear Sir:

Peference is made to your request for an official opinion of this office reading as follows:

"Will you please give me your official opinion as to whether the sheriff is authorized to hold a prisoner brought in by a member of the State Highway Patrol or an agent of the Conservation Commission over the week-end when no charge has been filed due to the fact that the Magistrate is not available to issue a warrant of commitment.

"If the sheriff is authorized to hold these individuals over twenty hours, can he accept a bond for their appearance in a Magistrate Court upon a misdemeanor charge?"

With respect to your first question, your attention is directed to Section 9195, R.S. Mo. 1939, reading as follows:

"The sheriff of each county in this state shall have the custody, rule, keeping and charge of the jail within his county, and of all the prisoners in such jail, and may appoint a jailer under him, for whose conduct he shall be responsible; but no justice of the peace shall act as jailer, or keeper of any jail, during the time he shall act as such justice."

Your attention is further directed to Section 9196, R. S. Mo. 1939, reading as follows:

"It shall be the duty of the sheriff and jailer to receive, from constables and other officers,

all persons who shall be apprehended by such constable or other officers, for offenses against this state, or who shall be committed to such jail by any competent authority; and if any sheriff or jailer shall refuse to receive any such person or persons, he shall be adjudged guilty of a misdemeanor, and on conviction shall be fined in the discretion of the court."

That agents of the Conservation Commission of Missouri have the power to arrest on view in certain specified instances appears from Section 8971.6, Missouri Revised Statutes Annotated, reading in part as follows:

"Any such agent may arrest, without warrant, any person caught by him or in his view violating or who he has good reason to believe is violating, or has violated this Act or any such rules and regulations, and take such person forthwith before a magistrate or any court having jurisdiction, who shall proceed without delay to hear, try and determine the matter as in other criminal cases."

Members of the State Highway Patrol have the right to arrest on view also, as appears from the provisions of Sections 8358a, Missouri Revised Statutes Annotated and 8360, R.S. Mo. 1939 which read in part as follows:

"The members of the State Highway Patrol shall have full power and authority as now or hereafter vested by law in peace officers when working with and at the special request of the sheriff of any county, or the chief of police of any city, or under the direction of the superintendent of the State Highway Patrol, or in the arrest of anyone violating any law in their presence or in the apprehension and arrest of any fugitive from justice on any felony violation. * * * **

Section 8360, R. S. Mo. 1939 reads as follows:

*Any person arrested by a member of the patrol shall forthwith be taken by such member before the court or magistrate having jurisdiction of the crime whereof such person so arrested is charged there to be dealt with according to law.

October 5, 1949

Viewing these various statutes in relationship with each other, it appears that it is the duty of the sheriff to receive such persons so arrested into his custody in the jail.

With respect to your second question, your attention is directed to Section 3965, R.S. Mo. 1939 which reads as follows:

"When any sheriff or other officer shall arrest a party by virtue of a warrant upon an indictment, or shall have a person in custody under a warrant of commitment on account of failing to find bail, and the amount of bail required is specified on the warrant, or if the case is a misdemeanor, such officer may take bail, which in no case shall be less than one hundred dollars, and discharge the person so held from actual custody."

This is the only statute which we find that authorizes a sheriff to take bail with the exception of Section 13136, R.S. Mo. 1939, which authorizes sheriffs to require offenders against the law in his view to enter into a recognizance for keeping the peace and appearance in Circuit Court. You will note that it is directed only to cases in which an arrest has been made under a warrant and does not relate to cases in which an arrest has been made on view. That in the absence of such statutory authority, a sheriff has no right to let a person to bail appears from State vs. Howell, ll Mo. 613. This was an action in which a recognizance had been taken by the sheriff upon arresting a person for contempt of court. The contemnor did not appear and a forfeiture was ordered and a scire facias issued. A demurrer to the scire facias was sustained by the trial court and its action in this regard affirmed in the following words:

"There is no law authorizing a sheriff to take a recognizance under the circumstances in which this was taken; therefore, his act was without authority and void. The other Judges concurring, the judgment will be affirmed."

Suprisingly, it does not seem that the General Assembly has at any time since the rendition of the decision quoted, seen fit to provide for the letting to bail of persons arrested on view; however, all of the statutes which we have found authorizing such arrests coupled with the power to make the arrest a requirement that the person so arrested be forthwith taken before a magistrate, then, of course, it would be possible for bail to be found. It is only due to the peculiar factual situation you have outlined and which no doubt occurs in many other counties that such persons are not afforded an opportunity to find bail.

October 5, 1949

In this regard, your attention is directed to Section 4346, R. S. Mo. 1939, the so-called, "twenty hour statute" which affects the right of persons so arrested to their release. The statute reads as follows:

> "All persons arrested and confined in any jail, calaboose or other place of confinement by any peace officer, without warrant or other process, for any alleged breach of the peace or other oriminal offense, or on suspicion thereof, shall be discharged from said custody within twenty hours from the time of such arrest, unless they shall be charged with a oriminal offense by the oath of some credible person, and be held by warrant to answer to such offense; and every such person shall, while so confined, be permitted at all reasonable hours during the day to consult with counsel or other persons in his behalf; and any person or officer who shall violate the provisions of this section, by refusing to release any person who shall be entitled to such release, or by refusing to permit him to see and consult with counsel or other persons, or who shall transfer any such prisoner to the custody or control of another, or to another place, or prefer against such person, a false charge, with intent to avoid the provisions of this section, shall be deemed guilty of a misdemeanor.

CONCLUSION

In the premises, we are of the opinion that a sheriff must receive into his custody persons arrested on view by the members of the State Highway Patrol, or agents of the Conservation Commission of Missouri.

It is our further opinion that such sheriff may not let to bail such persons so arrested, but that in the event a formal charge is not filed within twenty hours immediately following such arrest, such persons are entitled to discharge from custody.

Respectfully submitted,

Will F. Berry, Jr., Assistant Attorney General

APPROVED:

Attorney Constal

POST-DATED CHECKS:

(1) The drawer of a post-dated check given in payment of a pre-existing debt, which is not paid on presentation, is chargeable under R.S. 1939, Sec. 4695; (2) The drawer of a post-dated check given for money or property who states that the check is not good but will be good on its date, and which is not paid on presentation, is chargeable under R.S. 1939, Sec. 4695; (3) The drawer of a post-dated check given to a sheriff in payment of October 24, 1949 an execution, which is not

FILED 86

paid on presentation, is chargeable under R.S. 1939, Sec. 4695. Sheriff should not accept post-dated check in payment of execution.

10/27/49

Mr. Christian F. Stipp Prosecuting Attorney Carrollton, Missouri

Dear Sir:

This department is in receipt of your recent request for an official opinion upon three questions which will be considered by us in the order in which they have been submitted by you.

I.

Your first question is:

"Facts:

Defendant owed prosecuting witness \$190.00. On March 27, 1949 defendant gave to witness his check which was as follows:

Chillicothe, Mo.,

March 27, 1949

Chillicothe State Bank

Pay to the order of (name of witness) \$190.00

One hundred ninety and no/100 Dollars

Hold to July 15th Signature of defendant.

It was understood by both defendant and witness that defendant had no money in the bank
at that time, but defendant told witness that
on July 15th the check would be good. Defendant accepted the check as payment for the
amount due him and relied upon defendant's
statement that on July 15th the check would
be good. On July 16th the check was presented
for payment and not paid by the bank because
there was no account. Defendant has had no

money in or credit with the bank from before January 1, 1949 to date. About February, 1948, defendant had given another check to another party which was not paid by the bank because there was no account.

Questions:

- 1. Has a crime been committed by defendant?
- If so, under what section can he be charged?
- 3. Can defendant be charged under Sec. 4694, R.S. Mo. 1939?

We have here a question involving what is commonly called a "post-dated check." For a definition of such a check we direct your attention to the following excerpt from the opinion (1934) of the Missouri Supreme Court in the case of State vs. Taylor, 73 S.W. (2d) 378. There, in this connection, the court stated:

"A * A postdated check is thus defined in 7 C.J. page 674: 'A post-dated check is one containing a later date than that of delivery. The presumption is that the maker has an inadequate fund in the bank at the time of giving it, but that he will have enough at the date of presentation. Such a check is payable on or at any time after the day of its date, being in effect the same as if it had not been issued until that date.'

"Concerning the presumption that the maker of a postdated check has an inadequate fund in the bank at the time of giving it, but that he will have enough at the date of presentation, Corpus Juris cites Clarke National Bank v. Bank of Albion, 52 Barb. (N.Y.) 592, which thus states the rule: 'Post-dated checks are instruments often used, and their nature and character are well understood by bankers and the trading community. By all such persons it is regarded that the drawer is not in funds at the bank on which he draws

his check, when he makes and delivers the same, and does not expect to be, until the arrival of the date inserted in the check."

From the above definition of a "post-dated check" it seems clear to us that the check described by you in Question No. I quoted above is a "post-dated check," and thus comes within the scope of the law relating to such checks.

We are now concerned with the matter of the criminal liability, if any, of one who gives a post-dated check which is not honored upon presentation, when such presentation is made upon or subsequent to the post date. Again we call your attention to the Taylor case, cited above, which in this connection states:

"Nor is a postdated check outside the classes of instruments at which section 4305, (Section 4695, Mo. R.S.A. 1939) R.S. Mo. 1929 (Mo. St. Ann. Sec. 4305, p. 2998), is directed. Our statute covers 'any check, draft or order, for the payment of money, upon any bank or other depository. The California statute (Pen. Code, Sec. 476a) relates to 'any check or draft on a bank, banker or depositary for the payment of money. It should be noted that the two statutes use the words 'check or draft.' In the case of People v. Bercovitz. 163 Cal. 636, 126 P. 479, 480, 43 L.R.A. (N.S.) 667, the defendant sought a reversal of the judgment founded upon a verdict of guilty of uttering a postdated check in violation of the statute. He contended that a postdated check was not such an instrument as was intended to be described by the Penal Code. Of this contention the Supreme Court of California observed: 'We are of the opinion that these facts show the offense defined by section 476a, Penal Code, and that it is altogether immaterial that the check was dated February 6, 1911, when delivered during the evening of February 4, 1911. Even if we assume in accord with appellant's claim that, by reason of the fact that the instrument was postdated, it was not a "check" within the meaning of that word as used in section 476a, Penal Code, which we do not concede, it was clearly a "draft," the giving of which under such circumstances is likewise inhibited by the section, the language being "any check or draft."!

"The court quoted the statutory definition of the offense, and made this further comment: 'There is nothing in the language used having the effect of excepting a case from the operation of the statute merely because the "check or draft" is postdated. It is essential, of course, that there should be on the part of one giving the check or draft both present knowledge of the insufficiency of funds and absence of credit with such bank, etc., to meet the check or draft in full upon its presentation, and an intent to defraud; but no reason is apparent why both of these elements may not exist as well in the case of a postdated check or draft as in the case of one bearing the date of its delivery.'"

The question has been raised whether a postdated check is within the purview of section 4305, R. S. 1929 (Mo. St. Ann. Sec. 4305, p. 2998), inasmuch as the payee of such a check, in accepting it, relies upon the maker's promise to do something in the future rather than upon an assurance, express or implied, that the check is good when given. this it may be answered, as in the California case (People v. Bercovitz, supra), that there is nothing in the language used having the effect of excepting a case from the operation of the statute merely because the check is postdated. But a more complete answer is to be found in our own statutes. When section 4305, R.S. 1929, was enacted in 1917 (Laws Missouri, 1917, page 244), the Negotiable Instruments Law, enacted in 1905 (Laws of Missouri, 1905, p. 243 (Mo. St. Ann. Sec. 2629 et seq., p. 643 et seq.)), was on the statute books as it is to-day. Therefore, the General Assembly in 1917, in using the word 'check' in the insufficient funds statute, had in mind the definition of a check given by the Negotiable Instruments Law. That definition is as follows: 'A check is a bill of exchange drawn on a bank payable on demand. Except as herein otherwise provided, the provisions of this chapter applicable to a bill of exchange payable on demand apply to a check.' Section 2813, R.S. 1929, Mo. St. Ann. Sec. 2813, p. 721.

"A bill of exchange, which a check is declared to be, is thus defined in the Negotiable Instruments Law (section 2754, R.S. 1929, Mo. St. Ann. Sec. 2754, p. 708):
'A bill of exchange is an unconditional order in writing addressed by one person to another, signed by the person giving it, requiring the person to whom it is addressed to pay on demand or at a fixed or determinable future time a sum certain in money to order or to bearer.'

"It is to be observed that neither the definition of a check nor of a draft says aught about a date. The essence of a check and of a demand draft is that the instrument is an unconditional order in writing to pay a sum certain in money on demand.

"Pursuing the Negotiable Instruments Law further in our research for what was in the minds of the General Assembly when it enacted section 4305, we find that a check is a negotiable instrument. Section 2630, R. S. 1929, Mo. St. Ann. Sec. 2630, p. 644; Nelson v. Diffenderfer, 178 Mo. App. 48, 163 S.W. 271; John P. Mills Organization v. Bell, 225 Mo. App. 685, 37 S.W. (2d) 680.

"Therefore, there are applicable to checks sections 2640-2642, R. S. 1929, Mo. St. Ann. Sections 2640-2642, p. 649, showing the complacent state of mind of the lawmakers toward the true dating, antedating, postdating, and nondating of negotiable instruments.

"Sec. 2640: 'Where the instrument or an acceptance or any endorsement thereon is dated, such date is deemed prima facie to be the true date of the making, drawing, acceptance or indorsements, as the case may be.'

"Sec. 2641: 'The instrument is not invalid for the reason only that it is antedated or postdated: Provided, this is not done for an illegal or fraudulent purpose. The person to whom an instrument so dated is delivered acquires the title thereto as of the date of delivery.'

"Sec. 2642: 'Where an instrument expressed to be payable at a fixed period after date is issued undated, or where the acceptance of an instrument payable at a fixed period after sight is undated, any holder may insert therein the true date of issue or acceptance, and the instrument shall be payable accordingly. The insertion of a wrong date does not avoid the instrument in the hands of a subsequent holder in due course, but as to him the date so inserted is to be regarded as the true date.'

"From the foregoing it should clearly appear that the General Assembly in enacting the insufficient funds act (section 4305) not only did not exclude a postdated check from the purview of that section, but that it very difinitely meant to include it.

"These views are not changed by the theory that a postdated check is merely a statement of a future fact, promissory in its nature; namely, that the drawer of the check will have on deposit in the drawee bank on the date of the check sufficient funds to pay the check. We are of opinion that this objection falls within the rule of State ex rel. St. Louis-San Francisco Railway Company v. Daues et al., Judges, etc., 316 Mo. 474, 290 S.W. 425. The question in this court upon review by certiorari of an opinion of the St. Louis Court of Appeals was whether certain statements made by a claim agent of a railroad company as an inducement to a settlement with an injured passenger were misrepresentations of fact or were merely forecasts of what might happen in the future, and promissory. In deciding that question against the relator railroad company, this court said (290 S.W. 425, loc. cit. 428): 'The rule that a forecast of what will happen in the future is merely. promissory, and not a statement of existing fact, does not apply, where the matter involved is peculiarly within the speaker's knowledge. 26 C. J. 1090; Wendell v. Ozark Orchard Co. (Mo. App.) 200 S.W. 747, loc. cit. 749; Stonemets v. Head, 248 Mo. loc. cit. 252, 253, 154 S.W. 108. A statement may be promissory, or prospective, or an opinion in form,

and yet state a fact. The present representation was that the Frisco Railroad was going into the hands of a receiver, and the plaintiff probably would not get over 10 cents on the dollar. That implied a financial condition of the Frisco Railroad such as would carry it into the hands of a receiver. The agent was in better position to know the facts about that than the plaintiff. That was equivalent to saying that he believed it from knowledge in his possession, when in fact he had no such belief or knowledge, for he swore that he did not say it.

"The applicable statutes, sections 4305 and 4306, R. S. 1929 (Mo. St. Ann. Secs. 4305, 4306, pp. 2998, 2999), have an element of futurity in them. Section 4305 provides that any person shall be guilty of a misdemeanor who shall make or draw or utter or deliver, with intent to defraud, any check, draft, or order for the payment of money upon any bank, etc., knowing at the time of making, drawing, etc., that the maker or drawer has not sufficient funds in, or credit with, such bank upon its presentation. It is a matter of common experience that in the normal course of business most checks are not presented for payment at the instant time of or even upon the day of delievery to the payee. The test of sufficiency comes at the time of presentation. The maker of a check may have on deposit, at the time of issuance of a check, sufficient funds to meet it. But he may also have outstanding other checks at the time of issuance of a particular check, which other outstanding checks, by their earlier presentation and payment, will reduce the money on deposit below the amount necessary to pay the particular check upon its later presentation. Of all these conditions a drawer of checks must take account. 'A check of itself does not operate as an assignment of any part of the funds to the credit of the drawer with the bank, and the bank is not liable to the holder unless and until it accepts or certifies the check. 1 Negotiable Instruments Law, section 2817, R.S. 1929, Mo. St. Ann. Sec. 2817, p. 722."

We would here call your attention to Section 4694, Mo. R. S. A., 1939, which states:

"Every person who, with the intent to cheat and defraud, shall obtain or attempt to obtain, from any other person, or persons, any money, property or valuable thing whatever by means or by use of any trick or deception, or false and fraudulent representation, or statement or pretense, or by any other means or instrument or device, commonly called the confidence game, or by means, or by use, of any false or bogus check, or by means of a check drawn, with intent to cheat and defraud, on a bank in which the drawer of the check knows he has no funds, or by means, or by use, of any corporation stock or bonds, or by any other written or printed or engraved instrument, or spurious coin or metal, shall be deemed guilty of a felony, and upon conviction thereof be punished by imprisonment in the state penitentiary for a term not exceeding seven years."

This section quoted above has been interpreted by the court in the case of State v. Herman, 162 S.W.(2d) 873, in which case the court stated:

"As previously stated, the appellant was convicted under section 4694, R.S. Mo. 1939, Mo. R.S.A. Sec. 4694, for obtaining money under a false pretense. * * * as was said in the case of State v. Pickett, 174 Mo. 663, 74 S.W. 844, the purpose of this statute was to provide for a class of false representations not included in some other section dealing with the subject of the ordinary false representations. It was intended to reach a class of offenders known as "confidence men," who obtained the money of their victims by means of, or by the use of, some trick or representation designed to deceive. The very essence of the crime denounced by section 2213 (now section 4694) is that the injured party must have relied upon some false or deceitful pretense or device and parted with his property. State v. Wilson, 223 Mo. 156, loc. cit. 166, 122 S.W. 701, 704."

From the above it is the opinion of this department that the drawer of the check described in your question No. 1 has: committed a crime; that he is chargeable under Section 4695, Mo. R.S.A. 1939;

that he is not chargeable under Section 4694. Mo. R.S.A. 1939.

II.

Your second question is:

"When a person receives money or property or other valuable things and, at that time, gives a post dated check stating that there is no money in the bank at that time to pay the check but that on the date of the check it will be good, and, when presented, there is no account in the bank to pay the check, has a crime been committed?"

It is the opinion of this department that a crime has been committed under the fact situation quoted above. We believe that the proper section under which to file in this case is 4695, Mo. R.S.A. 1939, because when the drawer of the check states at the time of drawing the check that there is no money in the bank that this negatives the intent to cheat and defraud which Section 4694 Mo. R.S.A. 1939, requires. Under Section 4694, supra, the intent to cheat and defraud must be proved as an essential element of the offense. It is therefore the opinion of this department that, as we stated above, a crime has been committed in this instance and that Section 4695 is the proper section under which to file.

III.

Your question No. III is:

"A. received a civil judgment against B.
An execution was issued and the sheriff served
a copy of same on B. B., on February 10th,
told the sheriff that he had some hogs which
he wanted to sell and that he would have the
money in a few weeks. B. offered to give the
sheriff his check to hold. B. gave, the sheriff
his check dated February 26th and told him that
he had no money in the bank at that time and
further told the sheriff that if he (B.) did
not pay the sheriff the amount of the check before that time that he would have the money in
the bank and the check would be good on February
26th."

In connection with Part III of the request, it is asked if, under the facts, the sheriff is guilty of any impropriety. We are not exactly sure what you mean by the word impropriety, but we do believe that the sheriff did not act in accordance with law in accepting the check under the execution issued to him by the court.

Section 1317, R.S.A., provides that an execution should be a fieri facias against the goods, chattels and real estate of the party against whom the judgment is rendered. The statute then sets out the form of the execution issued to the sheriff directing him to seize the goods and chattels and real estate sufficient to satisfy the debt, damages, etc. It does not appear in the facts of Part III whether the check received by the sheriff was made payable to him or to the judgment creditor, but in any event, we do not believe that a post-dated check which was no good amounted to the taking of goods or chattels of the defendant as prescribed by the statute, sufficient to pay the debt.

In reading other sections of Article 19, Chapter 6 pertaining to executions and exemptions, it appears that the property taken under execution should be of a type that is subject to subsequent sale to pay the indebtedness. We do not believe that a post-dated check would fall within this category of property.

Section 1384, R. S. A., provides as follows:

"If any officer to whom any execution shall be delivered shall refuse or neglect to execute or levy the same according to law, or shall take in execution any property, or any property be delivered to him by any person against whom an execution is issued, and he shall neglect or refuse to make sale of the property so taken or delivered, according to law, or shall make a false return of such writ, then, in any of the cases aforesaid, such officer shall be liable and bound to pay the whole amount of money in such writ specified, or thereon indorsed and directed to be levied; and if such officer shall not, on the return of such writ, or at the time the same ought to be returned, have the money which he shall become liable to pay as aforesaid before the court, and pay the same according to the exigency of the writ, any person aggrieved thereby may have his action against such officer and his sureties upon his official bond, or may have his remedy by civil action against such officer in default."

Section 1385, R.S.A., provides:

"If any officer to whom any execution shall be delivered shall not return the same according to law and the command of the writ, such officer and his sureties shall be liable to pay the damages sustained by such default to be recovered by the party aggrieved, by action upon the official bond of the officer, or by civil action against such officer."

We believe that the sheriff under the facts in Part III of the request would probably be liable under Sections 1384 or 1385 or both.

In the case of Trigg vs. Harris, 49 Mo. 176, the sheriff collected a warrant under an execution issued to him, the warrant being on its face an amount sufficient to pay the indebtedness. For some reason, the creditor apparently was not paid what was owed him and the court in holding that recourse could be had against the sheriff on his bond, said, l.c. 177:

"The warrant was an instrument or evidence of debt, which was capable of being seized and levied upon by the sheriff, and it was his duty to collect the money on it and apply it to the execution when it cameinto his hands."

* * * * * * * * * * * * *

"If the sheriff received the warrant in satisfaction of the execution, it also satisfied the judgment; and if loss resulted to the creditor in consequence of the act of the sheriff, his recourse would be against that officer and his sureties upon his official bond. * * *"

Consequently, under the facts of Part III, in our opinion, it is very probable that the sheriff could be held liable on his bond to the judgment creditor, and his taking a post-dated check was certainly an exercise of bad judgment and probably not according to law. We therefore believe that the sheriff was guilty of an impropriety within whatever meaning you attach to this term.

Finally you inquire whether, when the check under the fact situation set out by you in question III, is presented on February 26, and is not paid because of no account in the bank, has B committed any crime?

It is the opinion of this department, under the fact situation

presented in Question III, that B has committed a crime. We have held above that the sheriff was guilty of an impropriety in taking the post dated check from B. However, we do not believe that this fact excuses B in giving a post dated check which he said would be covered by an account upon and after the date of the post dated check but which in fact was not good upon the date of the post date because B did not have any account in the bank upon which the check was drawn. B gave this check to the sheriff in satisfaction of the amount called for in the execution and he failed to cover the check on its post date. The fact that the sheriff was in error in taking the check does not, in our opinion, excuse B, and we believe that B should be charged under the familiar Section 4695.

CONCLUSION

It is the opinion of this department that the drawer of the check described in question I has committed a crime and is chargeable under Section 4695, Mo. R.S.A. 1939.

It is the further opinion of this department that under question II the drawer of the check has committed a crime and is chargeable under Section 4695, Mo. R.S.A. 1939.

Under your question III it is the opinion of this department that the sheriff is guilty of an impropriety. Under the second part of your question III it is the opinion of this department that the drawer of the check has committed a crime and is chargeable under Section 4695, Mo. R.S.A. 1939.

Respectfully submitted,

APPROVED:

TAYLOR

General

HUGH P. WILLIAMSON Assistant Attorney General

Procedure in cases where parties fail to MAGISTRATE COURTS: appear. December 3, 1949 Honorable Alex T. Stuart. Judge of the Magistrate Court Monroe County Paris. Missouri Dear Judge Stuart: This is in reply to your request for an opinion which reads as follows: "I request your written opinion on the following matter. "A civil suit pending in the Magistrate Court, as shown by record entry, continued by agreement of parties to a certain date. On date to which same was continued by agreement, neither party appeared, and neither party appearing court was not opened and no order of continuance made. No other entry or other action has been had in said cause, and the matter ever since, for more than one year, has remained in that same status. "Question. Does the Magistrate Court lose jurisdiction of the case so that same cannot be reset at this date for trial? "a. Would there be any difference concerning the continuance by agreement of parties and on continuance obtained on application of plaintiff or defendant, without consent or agreement? "b. Does the Magistrate need to make an order of continuance where same is set by agreement and neither party appears, and would it be necessary to continue each time same is set and neither party appears?" The procedure to be followed when a duly notified defendant fails to appear on the day set for trial of a cause is set out in Laws of Missouri, 1947, Volume 1 at page 244, and is as follows:

"Section 71. When a defendant who has been duly served with process, or when a defendant who has once appeared to the suit, the trial of which has been adjourned, shall neglect to appear according to the process or at the adjourned time, the magistrate shall proceed in the cause in the following manner: First, if the suit be founded upon an instrument of writing, which, or a verified copy of which, has been filed with the magistrate at the commencement of the action, and purporting to have been executed by the other party, and the demand of the plaintiff is liquidated by such instrument, the magistrate shall, whether the plaintiff appear or not, render judgment with costs against the defendant by default. for the amount which shall appear by such instrument to be due to the plaintiff, after allowing the proper discounts for all payments indorsed thereon; second, if the suit be not founded on an instrument of writing, as is declared in the preceding clause of this section, and the plaintiff appear in person or by his attorney, the magistrate shall proceed to hear his allegations and proofs, and shall determine the cause as the very right thereof shall appear from the testimony, and if it appears from such testimony that the plaintiff is entitled to recover, judgment shall be rendered by default against the defendant for so much as the testimony shows the plaintiff is entitled to, together with costs; and if it does not appear that the plaintiff ought to recover, judgment shall be given for the defendant as upon a verdict against the plaintiff; third, if the plaintiff fail to appear, except where the suit is founded on an instrument of writing as declared in the first clause of this section, the magistrate may render judgment of nonsuit against the plaintiff, with costs."

Thus, it is seen that if a suit is founded upon anstrument of writing which has been filed with the magistrate

at the commencement of the action, and the plaintiff's demand is liquidated by such instrument, the magistrate should proceed with the cause regardless of the absence of plaintiff or defendant. If the plaintiff fails to appear, except where the suit is founded on an instrument of writing, the above section provides that the magistrate may render judgment of nonsuit against the plaintiff. This section is substantially the same as Section 2635, R.S. Mo. 1939. However, the Legislature has substituted the word "may" for the word "shall" in the clause concerning the plaintiff's failure to appear if the action is not based upon a written instrument.

In the case of Bohle vs. Kingsley, 51 Mo. App. 389, the St. Louis Court of Appeals interpreted the language of Section 2635 to mean that the justice had no other authority to proceed in a suit except to nonsuit the plaintiff. That Court determined that the use of the word "shall" made it mandatory that such judgment of nonsuit be entered. In view of the fact that the section now uses the word "may" we believe that it will be construed to be discretionary with the magistrate to nonsuit the plaintiff, or not, as he sees fit. However, under the facts in the instant case, we believe that another provision of the Magistrate Law is applicable.

In Laws of Missouri, 1945, page 786, it is provided as follows:

"Sec. 65. No suit shall be deemed discontinued or abated by reason of the fallure of the magistrate to hold court at the appointed day, nor by reason of any adjournment before the business pending in such court is disposed of; but the same shall be continued and proceeded upon as if no such failure or adjournment had happened."

There is a general statute concerned with powers and duties of courts of record which reads as follows:

Section 2022, R.S. Mo. 1939:

"No writ, process or proceedings whatsoever, civil or criminal, shall be deemed discontinued or abated by reason of the failure of any term or session of any court, nor by reason of any adjournment in the cases mentioned in this chapter, or otherwise, before the business pending in such court is disposed of, but the same shall be continued and proceeded upon as if no failure or adjournment had happened."

The St. Louis Court of Appeals in the case of Hays vs. Dow, 166 S.W. (2d) 309, set out this section and following thereafter used the following language, 1.c. 313:

"Under the above statute, a suit properly commenced is sutomatically continued from term to term until finally disposed of. Alexander v. Haffner, 323 Mo. 1197, 20 S.W. 2d. 896. (Emphasis ours.)"

In the case of Alexander vs. Haffner, supra, the Supreme Court considered the question of continuance from term to term. In that case the Court said, 1.c. 1204:

"* * * A civil action under our Code is not commenced by the suing out and service of a writ, but by the filing of a petition 'and suing out of process therein. After a suit is so commenced it is automatically continued from term to term by statute until finally disposed of by some order or judgment of the court. (Sec. 2354, R.S. 1919.) Consequently no formal entry of continuance is necessary to keep the case in court. With us, and in modern practice generally, the term 'discontinuance is used as indicating merely that plaintiff has taken a nonsuit, or that there has been a dismissal. (Thurman v. James, 48 Mo. 235, 236; Ferber v. Brueckl, 7 S.W. (2d) 279; English v. Dickey, 128 Ind. 175, 182; Germania Fire Ins. Co. v. Francis, 52 Miss. 457, 467; Parsons v. Hill, 15 App. Cas. (D.C.)532; 9 R.C.L. sec. 2, pp. 191-2.) The ruling in Weaver v. Woodling, supra, was disapproved in Ferber v. Brueckl, 322 Mo. 892, 17 S.W. (2d) 524."

In the case of Hasler, et al. vs. Schopp, et al., 70 Mo. App. 469, the Court held that a justice of the peace who had acquired jurisdiction of an attachment suit in which defendants did not appear could continue the cause under the

authority of Sections 2645 and 2646, R.S. Mo. 1939, which sections are continued in substantially the same language in the present Magistrate Code and found in Laws of Missouri, 1945, page 791, Said sections are as follow:

Section 81:

"Upon the return day, if a jury be required, of if the magistrate be actually engaged in other official business, or in any case when it shall be necessary, the magistrate may continue the trial to another day without the consent of either party."

Section 82:

"The trial may be continued upon the application of either party, for good cause shown, to a day certain, not exceeding twenty days from the return day of the writ: Provided, that the magistrate may continue the cause for a longer time whenever he shall be satis-fied that it is necessary to do so, to enable the party to obtain testimony, or when both parties consent to such continuance. Every such continuance shall be at the cost of the party applying therefor, unless otherwise ordered by the magistrate."

The St. Louis Court of Appeals in the case of Lawyers Co-Operative Pub. Co. vs. Sleater, et al., 130 S.W. (2d) 192, reviewed the sections which we have set out above and concluded that none of these sections authorized an indefinite continuance. In that case the facts show that the action was continued four times to duly specified dates. On the date to . which the fourth continuance was granted the justice made and entered in his docket an order as follows:

> "Now, on May 24, 1929, the said cause again coming on for hearing, no disposition is made thereof, said cause is left open and undisposed of and at this date still remains open, undisposed of, and pending in this court. "

After reviewing the above sections, the Court said further, 1.c. 194:

"None of these sections authorizes an indefinite continuance, and we see no reason why the general rule that an indefinite continuance ousts the justice of jurisdiction should not apply here, particularly in view of the fact that a period of eight and a half years has elapsed without any steps whatever being taken by either of the parties or the justice to bring the action to trial. A discontinuance of the action thus clearly appears, so that it is obvious that defendants will not be subjected to the annoyance of a trial of it."

However, it appears that the Court's ruling was based, at least in part, upon the fact that a period of eight and one-half years had elapsed without any steps being taken by either of the parties or the justice to bring the action to trial. We believe that in view of the position taken by the Supreme Court in the case of Alexander vs. Haffner, supra, the proper rule applicable to the present set of facts is that the magistrate retains jurisdiction of the cause so that it may now be re-set for trial.

We do not see that there would be any difference whether the continuance was by agreement of parties or upon application of either.

You ask further if the magistrate need to make an order of continuance where same is set by agreement and neither party appears. We call your attention again to Section 71, Laws of Missouri, 1947, page 244, which has been set out above. This section provides a procedure to be followed by a magistrate in several instances wherein parties failed to appear. Where the facts of a case indicate, this section should be followed because it is the procedure provided for Magistrate courts by the Legislature. We realize that the practice is not always to this effect. However, since the Legislature has expressed its will in the matter the statute should be followed insofar as it applies.

CONCLUSION.

Therefore, it is the opinion of this department that:

1) Where neither party to a suit appears and Court is not opened, the magistrate retains jurisdiction of the cause;

When a suit is founded upon an instrument of writing which liquidates the plaintiff's claim, the magistrate should enter judgment for plaintiff when neither party appears. If a suit is not of this nature, and plaintiff fails to appear, it is discretionary with the magistrate to nonsuit the plaintiff;

- 2) There is no difference in legal effect of continuances where the parties subsequently fail to appear whether the continuances were by agreement or upon application of either party;
- 3) It is not necessary for the magistrate to continue a cause each time the same is set and neither party appears but he should follow the procedure set out in Section 71, Laws of Missouri, 1947, page 244.

Respectfully submitted,

JOHN R. BATY Assistant Attorney General

APPROVED:

J. E. TAYLOR Attorney Gene

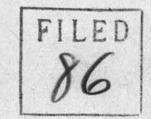
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I. SHERIFF:

FEES FOR TRANSPORTATION OF PRISONERS: Deputy sheriff may be employed as a guard to assist sheriff to transport prisoners to the State Penitentiary; fees received for the performance of such services shall be collected by the sheriff for the county and paid by him into the county treasury.

December 20, 1949

Hon. J. L. Sturgis
Asst. Prosecuting Attorney
Greene County
Epringfield, Missouri



Dear Mr. Sturgis:

We have received your recent letter requesting an official opinion of this department. Your opinion request reads as follows:

"I desire to request an official opinion in behalf of my Sheriff Glenn Hendrix of Greene County relative to his duties.

"May the Circuit Judge appoint a deputy sheriff as a guard to assist the Sheriff of Greene County in taking a prisoner to the State Penitentiary, Jefferson City, Missouri?

"Is the sheriff entitled to collect from the State the mileage and expenses for said guard?"

Two questions embodied in your opinion request will be numbered one and two, in the order presented and will be set out at the beginning of the discussion of their particular subject.

QUESTION NO. 1

"May the Circuit Judge appoint a deputy sheriff as a guard to assist the Sheriff of Greene County in taking a prisoner to the State Penitentiary, Jefferson City, Missouri?"

Section 13413, R. S. Mo. 1939, is the only statute relating to the transportation of prisoners to the State Penitentiary wherein the term "guard" is used. This is a general statute in that no specific distinctions are made as regards the

manner of employment of such guard in counties of different classifications, thus the said statute would be applicable to the employment of the said guards in all counties. The provision for the employment of such guard is stated as follows:

" * * * * When three or more convicts are being taken to the penitentiary at one time, a guard may be employed, but no guard shall be employed for a less number of convicts except upon the order, entered of record, of the judge of the court in which the conviction was had, and any additional guards employed by order of the judge shall, in no event, exceed one for every three prisoners.

(Underscoring ours)

Applying the above quotation of the aforementioned statute to the question at hand it would seem to follow that the sheriff may, of his own accord, employ the said guard whenever the sheriff is required to transport three or more prisoners to the State Penitentiary at any one time; and if a lesser number of prisoners are being so transported the sheriff may then employ such guard only upon the order, entered of record, by the judge of the court in which the conviction was had. It must therefore follow that the authority of the Circuit Judge, insofar as regards the employment of such guard, would extend only so far as to provide authorization to the sheriff to employ such guard in the event that a guard is required to transport fewer than three prisoners to the State Penitentiary.

From the foregoing construction of the quoted provision of Section 13413, R. S. Mo. 1939, it will be noticed that the actual employment of the said guard is a matter which comes within the discretion of the sheriff. However, it is the opinion of this department that, an attempted appointment of a specific guard by the Circuit Judge would have the effect of being a mere suggestion and recommendation to the sheriff to employ such individual as a guard, which suggestion and recommendation the sheriff is free to accept or reject as he may see fit. If he accepts the same and allows said individual to assist in the transpor-

tation of the prisoners to the State Penitentiary he would in effect be employing the said individual so recommended as a guard for such purpose.

After a careful and complete study of the entire section herein involved, we found no provision which provided for the disqualification of a deputy sheriff or other county officer to act as a guard in assisting the sheriff in the transportation of prisoners to the State Penitentiary. Hence, we are of the opinion that a deputy sheriff may be employed as a guard to assist the sheriff in transporting prisoners to the State Penitentiary.

QUESTION 2.

"Is the sheriff entitled to collect from the State the mileage and expense of said guard?"

Section 13413, R. S. Mo. 1939, makes provision for the payment of the mileage allowance of such guard. The pertinent provision of Section 13413, R. S. Mo. 1939, in this regard reads as follows:

" * * * * For the services of taking convicts to the penitentiary, the sheriff, county marshal or other officer shall receive the sum of three dollars per day for the time actually and necessarily employed in traveling to and from the penitentiary, and each guard shall receive the sum of two dollars per day for the same, and the sheriff, county marshal or other officer and guard shall receive five cents per mile for the distance necessarily traveled in going to and returning from the penitentiary, the time and distance to be estimated by the most usually traveled route from the place of departure to the penitentiary;

(Underscoring ours)

It will be noticed that the above quotation provides that the guard so employed shall receive \$2.00 per day as his fee and 5% per mile for the distance necessarily travelled, going to and returning from the penitentiary, as reimbursement for expenses incurred by said guard in assisting the sheriff in the said transportation of prinsoners. This provision would, therefore, of necessity limit the liability of the State insofar as regards the expenses of said guard, to the mileage allowance alone, and does not therefore

entitle the sheriff to collect from the State any amount in excess of the mileage allowance as expenses for said guard.

The procedure to be followed for the recovery of the fee and mileage allowance of said guard from the State is stated in Section 13413, R. S. Mo, 1939 as follows:

" * * * before any claim for taking convicts to the penitentiary is allowed, the sheriff, or other officer conveying such convict, shall file with the state auditor an itemized statement of his account, in which he shall give the name of each convict conveyed and the name of each guard actually employed, with the number of miles necessarily traveled and the number of days required. which in no case shall exceed three days. and which account shall be signed and sworn to by such officer and accompanied by a certificate from the warden of the penitentiary, or his deputy, that such convicts have been delieverd at the penitentiary and were accompanied by each of the officers and guards named in the account. * * * * * * *

Section 13, Article 6, Missouri Constitution, 1945, provides for the compensation of State and County officers dealing with accused persons to be by salary only. Said section is as follows:

"All state and county officers, except constables and justices of the peace, charged with the investigation, arrest, prosecution, custody, care, feeding commitment, or transportation of persons accused of or convicted of a criminal offense shall be compensated for their official services only by salaries, and any fees and charges collected by any such officers in such cases shall be paid into the general revenue fund entitled to receive the same, as provided by law. Any fees earned by any such officers in civil matters may be retained by them as provided by law."

(Underscoring ours)

The above quoted constitutional provision precludes all such designated officers from retaining said fees for their own use and benefit.

Provision for the collection and disposition of fees in criminal matters as pertaining to counties of the second class, the classification of Greene County, is made in Section 13547.203 as follows:

"It shall be the duty of the sheriff to charge, collect and receive, upon behalf of the county, every fee, penalty, charge, commission, and other money that accrue to him or his office in connection with criminal matters, and all such fees, penalties, charges, commissions, and money collected by him, shall at the end of each month, be paid by him to the county treasurer, as hereafter provided."

It will be noticed that the foregoing quoted section requires the collection of all such fees to be made by the sheriff for the benefit of the county and the same shall be paid by him to the county treasurer.

It is our opinion that the sheriff of a second class county is entitled to collect from the State the mileage allowance of 5¢ per mile necessarily travelled by said guard in going to and returning from the penitentiary and the \$2.00 fee provided for as payment to said guard and that the sheriff is then required to pay any sums so collected, into the county treasury; if the guard so employed is a deputy sheriff.

CONCLUSION

It is, therefore, the opinion of this department that a deputy sheriff may be employed by the sheriff as a guard to assist said sheriff in the transportation of prisoners to the State Penitentiary; that an attempted appointment by the Circuit Judge of a deputy sheriff to act as a guard to so assist the sheriff is of no more effect than to

constitute a suggestion and recommendation to the sheriff to employ the said deputy as a guard, and it is further the opinion of this department that any fees and remuneration received by the said deputy sheriff for performance of the duties of a guard shall be collected from the State by the sheriff for the benefit of the county, and paid by said sheriff into the county treasury.

Respectfully submitted

PHILIP M. SESTRIC Assistant Attorney General

APPROVED

J. E. TAYLOR
ATTORNEY GENERAL

PMS: A

CONSERVATION COMMISSION: Agents may enter posted land in performance of duty.

March 21, 1949

Hon. Homer L. Swenson Prosecuting Attorney Wright County Mountain Grove, Missouri

Dear Sir:

We have received your request for an opinion of this department, which request is as follows:

"I have been informed that the State Conservation Commission has ruled that the gigging of fish is to be forbidden in the Gasconade water shed, in this County, which water shed includes Whetstone and Beaver Creeks and the Gasconade river proper.

"Since hearing of this new regulation some of the land owners along these streams have posted their property barring all fishermen and 'Game Wardens' which includes parties on float trips from one point to another. The local conservation agent informs me that eventually all of the land owners along these streams will post their lands as set out above.

"I have advised the local conservation agent that he may proceed to carry out his duties in spite of the posting by the owners until further notice from me.

"Your opinion on the above, relative to the power and right of the conservation agent, is hereby requested."



Agents of the Conservation Commission are the persons primarily charged with the duty of enforcing the laws of this state and the rules and regulations of the Conservation Commission pertaining to fish and wildlife. The Wildlife and Forestry Act, Laws of Missouri, 1945, page 664, sets out some of the powers and duties of such agents. Section 5 of the act authorizes them to make complaints and cause proceedings to be instituted against persons violating the act or the rules and regulations of the Conservation Commission: to search, without a warrant, any creel, container, game bag, hunting coat, or boat, in which they have reason to believe wildlife is unlawfully concealed; and, upon the issuance of a search warrant, to search dwellings, locker plants, motor vehicles, or express cars, in which they have reason to be-lieve wildlife is illegally possessed or concealed. Section 6 of the act authorizes them to serve criminal process in cases of violation of the act or the rules and regulations of the Conservation Commission, and to arrest, without a warrant, any person caught by them or in their view violating the act or the rules and regulations of the Commission.

Obviously, if the agents of the Conservation Commission are to carry out their duties properly, they will find it necessary to enter upon privately owned lands. However, the law is well settled that an officer of the law, acting in the performance of his duties, will not be guilty of trespass by reason of his entering the lands of private persons. (52 Am. Jur., Trespass, Section 41, page 868; 63 C. J., Trespass, Section 121, page 960.) He may, of course, become guilty of trespass by acting in excess of his authority.

The fact that the land is posted with notices forbidding the entrance of "Game Wardens" would not alter the situation. There is no law which permits a person, by posting a notice on his premises, to preclude a duly authorized officer from entering the said premises in the performance of his duties. To permit a landowner to do so by such action would, in effect, nullify the authority of such officers and render their efforts at enforcement completely unavailing.

Agents of the Conservation Commission are required, by Section 5 of the Wildlife and Forestry Act, to obtain a search warrant prior to entering an occupied dwelling and outbuildings immediately adjacent thereto. However, there is no requirement that a search warrant be obtained prior to his entering an open field. Numerous cases have upheld the right of police officers to search such premises without a warrant in the enforcement of liquor laws. (State v. Cobb, 309 Mo. 89, 273 S.W. 736; State v. Dailey, 280 S.W. 1044, Ann. 74 A.L.R. 1454.) There would appear to be no reason for applying a different rule to officers enforcing game laws.

CONCLUSION

Therefore, it is the opinion of this department that agents of the Conservation Commission, in the performance of their duties, may enter upon privately owned lands, and the fact that such lands have been posted with notices forbidding the entry of "Game Wardens" will not prevent their entering such lands in the performance of their duties.

Respectfully submitted,

ROBERT R. WELBORN Assistant Attorney General

APPROVED:

J. E. TAYLOR Attorney General OFFICERS: Office of mayor and that of circuit clerk and recorder are compatible.

May 6, 1949

FILED 87

Mr. Homer L. Swenson Prosecuting Attorney Wright County Mountain Grove, Missouri

Dear Sir:

Your opinion request of recent date reads in part as follows:

"In the recent city election at Hartville, Missouri, which is a city of the fourth class, Mr. Burke Dennis was elected mayor of said city.

"Mr. Dennis is also Circuit Clerk and Recorder of Deeds of Wright County and the question has been raised as to whether he can legally hold both positions."

There is no constitutional or statutory provision which would not allow an individual to hold both the office of mayor of a city of the fourth class and at the same time the office of circuit clerk and ex officio recorder of deeds in a fourth class county. However, there is also the common law doctrine of incompatible and inconsistent offices to consider. In the case of State ex rel. Walker v. Bus, 135 Mo. 325, 36 S.W. 636, wherein there was the question of whether the duties of the office of deputy sheriff and those of school director were so inconsistent and incompatible that they should not be held by the same person at the same time, the Supreme Court of Missouri, at 1.c. 338, states the common law rule as follows:

"* * *At common law the only limit to the number of offices one person might hold was that they should be compatible and consistent. The incompatibility does not consist in a physical inability of one person to discharge the duties of the two offices, but there must be some inconsistency in the functions of the two; some conflict

Mr. Homer L. Swenson

in the duties required of the officers, as where one has some supervision of the other, is required to deal with, control, or assist him. * * * *"

In counties of the fourth class, the circuit clerk is ex officio recorder of deeds, which two offices are essentially ministerial in character. In no instance would the circuit clerk and ex officio recorder of deeds have any supervision over, control, or assist the office of mayor.

The office of mayor in a fourth class city is the chief executive office within that city. This office has the general supervision over all the offices and affairs of the city and has the duty to execute the laws and regulations of that city. The offices of circuit clerk and recorder of deeds are not city offices, but rather county offices, over which the office of mayor would have no control or supervision. There are no circumstances whereby a conflict in the duties of the offices under consideration here would arise, and such offices are therefore compatible and may be held by the same person at the same time.

CONCLUSION

Therefore, it is the opinion of this department that the office of mayor of a city of the fourth class and that of circuit clerks and recorder of deeds in counties of the fourth class are not inconsistent or incompatible, and can be held by the same person at the same time.

Respectfully submitted,

RICHARD H. VOSS Assistant Attorney General

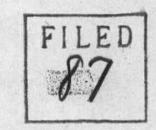
APPROVED:

J. E. TAYLOR Attorney General PROBATE COURT COSTS CLERKS COURTS

Cost of publishing probate court docket which exceeds the statutory amount allowed to be charged against estates for that purpose, shall be paid out of the county treasury.

June 9, 1949

Honorable A. B. Suenkel Judge of Probate Court and Magistrate Gasconade County Hermann, Missouri



Dear Sir:

We are in receipt of your letter of May 28th, 1949, in which you request an opinion of this office as follows:

"According to Statute we can charge in each estate the sum of 20 f for publishing the docket. Our publishers figure Legal rate now and I do not find any way to get that money. To explain; On last docket of 27 cases we collected \$5.40. The Printer has a charge of 10.50. Where do I get the money to pay that.

"Will you kindly check and inform me in this case. Thanks."

Section 215, R. S. Missouri, 1939, reads as follows:

"It shall be the duty of the clerk of the probate court, thirty days before each regular term, to make a docket, listing the names of all executors and administrators whose settlements are due at such term, and shall designate in such docket the day upon which each settlement is required to be made, and shall cause the same to be published for three weeks in some newspaper published in the county, if there be one, the cost of which to be paid as provided by law for the publication of the docket in cases of the settlements of guardians and curators, and if there be no such paper published in the county, the clerk shall post up such docket in some conspicuous place in his office thirty days before said term; and on the day so appointed, the executor or administrator shall appear and make his settlement, unless for good cause shown the court shall continue the same.

Section 421, R. S. Missouri, 1939, reads as follows:

"The probate court shall keep a docket in which shall be entered, at least thirty days before each regular term, the names of all guardians and curators whose settlements are due each term, and shall designate in such docket the particular day of said term upon which such settlement is ordered to be made, and shall cause the same to be published for three weeks in some newspaper published in the county, if there be one, and the court shall divide the cost of printing each docket by the whole number of cases docketed. and tax against each estate the amount ascertained by such division as its cost in the case: Provided, that cost of publication shall not exceed twenty cents for each estate. And if there be no newspaper published in the county, a copy of the docket shall be posted by the clerk in some conspicuous place in his office; and on the day so appointed, the guardian or curator shall appear and make his settlement, unless, for good cause shown, the court shall order the same to be postponed to some other day or term."

These two sections indicate that it is the duty of the clerk of the probate court to make a docket of the settlements due at regular terms of the probate court. The cost of such publication is to be paid by taxing the estates involved for their prorata share of the cost. However, a maximum of twenty cents may be charged each estate for this purpose. There is, therefore, a statutory prohibition against taxing the estates in any greater amount. Under the situation presented in your letter, there is thus an additional cost, arising due to changing times, which is unprovided for by statutory enactments.

Since the statute places a duty upon the probate clerk to cause the publication of a docket, the question becomes one of whether the probate clerk or the revenue fund of the county should be charged with the extra cost. There are two lines of decisions with regard to the question of whether expenses are payable by the county, where a county officer incurs such expenses. The first is one in which there is a question of additional compensation to the officer,

and the courts hold that the officer may not be allowed to receive a remuneration which is very close to compensation, even though it may be in the form of payment to someone to assist him in the performance of his duties. This line of case is exemplified by the cases of Maxwell v. Andrew County, 146 S.W. (2d) 621, and Alexander v. Stoddard County, 210 S.W. (2d) 107. Another line of cases deals with those expenses which are closely allied to or which are a part of the necessary material tools with which it is necessary to conduct the duties of an office. This line of cases is exemplified by the cases of Ewing v. Vernon County, 216 Mo. 681, 116 S.W. 518; Buchanan v. Ralls County, 283 Mo. 10, 222 S.W. 1002; and Rinehart v. Howell County, 153 S.W. (2d) 381.

These cases involve such things as janitorial services, stamps, stationery, etc. In the Rinehart case stenographic services for the Prosecuting Attorney were involved. In the recent case of Alexander v. Stoddard County, supra, the Supreme Court of Missouri held that the treasurer and ex-officio collector of Stoddard County could not recover salary paid to a deputy for aiding him in the performance of his duties. The court in that case said, 1. c. 108:

"The Ewing case was distinguished in Maxwell v. Andrew County, 347 Mo. 156, 164, 146 S.W. 2d 621, 625: 'It is true that there are certain decisions in which it has been said that where an officer in performing a duty enjoined on him by statute necessarily expends his own funds, there being no statutory provision for meeting these expenses out of the public treasury, he may be reimbursed for such expenses. * * * A careful review of these decisions, however, discloses that they are based upon a construction of the particular statutes involved and hold that by reasonable implication they permit payment of some particular item of expense. The present case is not an instance of the legislature's providing for an office or for official duties but wholly failing to provide some method of paying for them. 20 Ann. Cas. 148. The Rinehart case is distinguishable on these facts: The prosecuting attorney of Howell County was paid a fixed, annual, statutory salary and there was no statutory provision for paying his stenographer."

The court also found a specific prohibition of the type of payment which was sought, that is, payment out of the general revenue act of the county, in a statutory provision that deputies should be paid out of "'fees and commissions earned and collected by such officer only and not from general revenue."

The case of Rinehart v. Howell County, supra, mentioned in the above quotation stated that where a duty was imposed upon an officer and there was no provision for necessary expense in the performance of the duty, that the officer was entitled to have it paid by the county. The Alexander case distinguishes the Rinehart case on the grounds that in the former case this statutory provision as to payment of deputies was provided for. In other words, in the Alexander case, it was clear from statutory enactment that the Legislature intended that the treasurer and ex-officio collector should pay for the deputies himself. This was not true in the Rinehart case, and we are of the opinion that it is not true in the instant situation. It seems clear that the Legislature intended that the probate clerk should not pay the cost of the publication of the docket, since they specifically provided that it should come out of the estate. Yet, they have failed to amend the statute to bring the allowance in line with the rising cost of publication. We are of the opinion that this presents a situation analogous to that in the Rinehart case.

The court in the Alexander case stated to the effect that in the cases in which allowance for expenses had been approved, the court found some statutory provision from which a reasonable inference could be raised that such expense should be paid. In the Rinehart case this consisted only of the fact that a duty was placed upon an officer, and there was no provision for paying for it.

In the situation before us now there was a method of payment, but the method is now a wholly inadequate one. We are therefore of the opinion that this situation is much more analogous to that in the Rinehart case than in any of the other cases dealing with this type of thing. This is especially true where there is not, as there was in the Alexander case, any statutory provision which even remotely indicates that the payment should come out of the pocket of the county officer.

It may be superfluous to add that the publishing of the docket, is county business, and the cost of its publication is as much beneficial to the county as was the purchase of stationery and other office supplies in some of the other cases mentioned above.

CONCLUSION.

We are therefore of the opinion that, pending an amendment of the General Assembly of Missouri, which will bring the amount allowed

Hon. A. B. Suenkel -5-June 9, 1949 to be charged against estates into line with present costs, the cost of publishing the probate court dockets which exceeds the amount allowed to be charged to the estates involved, is payable out of the revenue funds of Gasconade County. Respectfully submitted, SMITH N. CROWE, JR. Assistant Attorney General APPROVED: J. E. TAYLOR Attorney General SNC/few

CORPORATIONS: (1) At common law, no right to vote by PROXIES: proxy at a corporate election; (2) Proxy COUNTY HEALTH CENTERS: voting may be permitted by bylaws.

June 30, 1949

SPECIAL DELIVERY

Hon. Homer L. Swenson Prosecuting Attorney Wright County Mountain Grove, Missouri



Dear Sir:

This is in reply to your request for an opinion, which is as follows:

"The Wright County Health Center, Inc., has been organized in this County by virtue of a pro-forma decree of the Circuit Court and has been issued a charter by the Secretary of State. The corporation has not had a regular meeting for the purpose of organization, election of officers and adoption of by-laws and other necessary steps to perfect the corporate organization.

"A controversy has arisen over the question of the members casting votes by proxy. The following questions have been propounded to me:

- "(1) May the members of this corporation cast their votes by proxy?
- "(2) If so, do the members, by a majority vote, have the right to prohibit the casting of votes by proxy?
- "(3) If the members do have the right to prohibit proxy voting may proxy votes be voted on the motion submitted to so prohibit proxy voting?"

As we understand the background for your request, the Wright County Health Center, Inc., has not as yet had an organizational meeting and taken the necessary steps to perfect the corporate organization. The primary question for consideration is whether or not proxy voting should be allowed on the first motions to be voted on at the organizational meeting. As we understand the facts, there is mothing in the corporate charter either allowing proxy voting or prohibiting proxy voting.

The Wright County Health Center, Inc., came into existence in order to comply with the provisions of a statute enacted by the 63rd General Assembly, Section 4 of which reads, in part, as follows (Laws of Mo. 1945, page 970):

"The location, building, maintenance and operation of said public county health center shall be vested in a bona fide organization of at least two hundred and fifty resident members, paying annual dues each of at least one dollar, be a corporate body, constitution and by-laws legally adopted, and its officers legally elected and qualified, and when so formed, shall be the legal and official body in the county or counties for the promotion of health activities in said county or counties. * * *

The actual incorporation of the county health center was accomplished under Article 10, Chapter 33, Laws of Missouri, 1939, which provides for the incorporation of associations formed for benevolent, religious, scientific, fraternal-beneficial, or educational purposes. There is nothing in Article 10 either prohibiting or allowing proxy voting.

The common-law rule is set out in 14 C. J., at page 907, as follows:

"At common law there is no right to vote by proxy at a corporate election, but every vote must be personally given. To authorize a vote of this character it must be conferred by statute, charter or by-law. * * *" One of the earliest and leading cases on the common-law rule of voting by proxy is that of Taylor v. Griswold, 14 N. J. 222. In discussing the common-law rule, the Supreme Court of New Jersey said, 1.c. 226:

"1st. The first inquiry then is, whether, upon general and common law principles, the members of any corporation have a right, as a matter of course, to be represented, and to vote by proxy? This question must be answered in the negative. It is clear. that when the charter is silent, and no bylaws have yet been passed, regulating the mode of election, and of voting upon other questions that may arise in conducting the ordinary and appropriate business of the corporation, the corporators, when lawfully assembled, must be governed by the same rules and principles that prevail in all primary assemblies. That is, until a different rule has been established by some competent authority, every question must be decided, and every election determined by the majority; or in other words, by the major part numerically, of those who are personally present, and voting. illustrate my meaning, let it be supposed, that the charter expressly authorizes the company to determine whether the members of it, shall be permitted to vote by proxy or not: At the very first meeting of the company, the question is proposed, How shall members vote on this question? In person or by proxy? Certainly not by proxy: for that would be to admit proxies before there is any law to authorize their admission. This primary vote must then be given and determined by the majority of the corporators present and voting in person. Angell and Ames on Corporations, 67; Rex v. Foxcroft, 2 Burr. R. 1017; 2 Kent's Com. 1st Ed. 236; Phillips v. Wickham, 1 Paige's C. R. 598. And to these authorities may be added, The State v. Tudor, 5 Day's Rep. 329; for the court in that case, fully admit the general rule as above stated.

, A . .

Again, in the early case of Commonwealth v. Bringhurst, 103 Penn; 134, the court was considering a case wherein the principal question was the right of the stockholders to vote by proxy in the annual election of officers of the corporation. Neither the charter nor bylaws authorized the stockholders to so vote. In its opinion the court said, 1.c. 138:

"That a right to vote by proxy is not a common law right, and therefore not necessarily incident to the shareholders in a corporation appears to have been recognized in Brown v. Commonwealth, 3 Grant 209, and in Craig v. First Presbyterian Church, 7 Norris 42.

"The selection of officers to manage the affairs of this corporation required the exercise of judgment and discretion. must be elected by ballot. The fact that it is a business corporation in no wise dispenses with the obligation of all the members to assemble together, unless otherwise provided, for the exercise of a right to participate in the election of their officers. Although it be designated as a private corporation, yet it acquired its rights from legislative power, and it must transact its business in subordination to that power. As then the relators cannot point to any language in the charter expressly giving a right to vote by proxy. and it is not authorized by any by-law, they have no foundation on which to rest their claim. * * *

The case of Pohle v. Rhode Island Food Dealers Ass'n, Inc., 7 Atl. (2d) 267, was one wherein facts were very similar to the facts in the case under discussion in this opinion. The respondent corporation had organized as a nonbusiness corporation in July, 1937. At its first annual meeting on July 12, 1938, two groups for candidates for various offices were nominated, the first being composed of the complainants and the other composed of members who were then and at the time of the decision holding the offices. At the meeting votes by proxy were offered solely on behalf of the incumbent officers, and the presiding officer ruled that voting by proxy was valid and would be allowed. Thereupon, by counting such proxy votes for the incumbent group,

they were declared elected. The court considered several sections of the Laws of Rhode Island which conferred the authority upon corporations to make bylaws to determine the manner of electing its officers and directors and "the mode of voting by proxy," etc. Other sections of the Rhode Island statutes provided generally that bylaws of corporations might permit voting by proxy. The court ruled that the mere authorization to place such provisions in the bylaws was not tantamount to statutory authorization for proxy voting in the absence of a showing that the bylaws or articles of association did in fact permit proxy voting. In its decision the court relied upon the common-law rule that voting by proxy at corporate elections was not permissible.

So, in the case before us, we believe that voting by proxy should not be allowed at the organizational meeting and thereafter unless the bylaws adopted at such meeting so state.

The authority for the adoption of bylaws by the corporation may be found in the act providing for county health centers (quoted above) and also by virtue of the authority granted to these corporations by Section 5446, R. S. Mo. 1939, which reads as follows:

"Every corporation created under this article shall make by-laws for its government and support and the management of its property, and therein provide, unless such provision is already made in its charter, for the admission of new members and how they shall be admitted, and prescribe their qualifications. Provision may also be made in such by-laws for the removal of officers for cause, and for the expulsion of members guilty of any offense which affects the interests or good government of the corporation, or is indictable by the laws of the land: Provided, always, that such by-laws shall be conformable to the charter of such corporation, and shall not impair or limit any provision thereof or enlarge its scope, and shall not be contrary to the provisions of the Constitution or laws of this state."

It is the opinion of the majority of the authorities in this country that the right to vote by proxy may be conferred by a

bylaw of the corporation. The subject of corporate proxies is rather extensively covered in 41 Mich. Law Rev., page 38, ff. In that article the author reviews the law of corporate proxies and concludes generally that the rule for proxy voting may be permitted by the bylaws of a corporation.

In the early case of People v. Crossley, 69 Ill. 195, the court was considering a case involving an association organized under an act for the incorporation of benevolent, etc., societies. The constitution "(or by-laws)" of the corporation provided for voting by proxy upon all questions before the society. The court upheld the validity of such a bylaw, quoting a constitutional provision of the State of Illinois providing for votes by proxies in elections for directors or managers of incorporated companies. The court considered this provision as a constitutional expression in favor of a policy of voting by proxy in private corporations and applied this policy in upholding the validity of a bylaw providing for proxy voting in a benevolent corporation. The court held that the bylaw in question was consistent with the Constitution and Laws of the State of Illinois.

In the Constitution of Missouri, 1945, there is a similar provision, Article XI, Section 6, which provides for a method of voting for directors or managers of corporations, "either in person or by proxy." We believe that the Missouri courts would follow the Illinois Supreme Court's reasoning and consider this provision as a constitutional expression in favor of proxy voting. The Illinois court expressed doubt as to its direct application to benevolent corporations, and we think this would be the Missouri rule. Therefore, it would seem that if the bylaws of a corporation so state, voting by proxy may be permitted on questions before the members of the corporation.

Since the Wright County Health Center is a newly formed corporation and has no custom or usage, we have not discussed the rule concerning the effect of custom or usage on proxy voting.

Conclusion.

Therefore, it is the opinion of this department that:

(1) On the original proposition to permit voting by proxy, only the vote of those members present may be considered.

- (2) The members present may adopt a bylaw permitting vote by proxy.
- (3) If the members present do not adopt such a bylaw, proxy voting is not permitted.

Respectfully submitted,

JOHN R. BATY Assistant Attorney General

APPROVED:

J. E. TAYLOR Attorney General

JRB:ml

MERIT SYSTEMS: COUNTY HEALTH CENTERS: HEALTH: State Merit System Act not applicable to County Public Health Centers.

August 26, 1949

8.7

Honorable Henri Sursa Prosecuting Attorney Madison County Fredericktown, Missouri

Dear Mr. Sursa:

This will acknowledge receipt of your request for an opinion which we restate for the purposes of brevity as follows:

"Does a county health center have authority to employ and determine the compensation of personnel without reference to the State Merit System?"

The powers and duties of a public county health center are set out in Laws of Missouri, 1945, page 970, as follows:

Section 4. "The location, building, maintenance and operation of said public county health center shall be vested in a bona fide organization of at least two hundred and fifty resident members, paying annual dues each of at least one dollar, be a corporate body constitution and by-laws legally adopted and its officers legally elected and qualified, and when so formed, shall be the legal and official body in the county or counties for the promotion of health activities in said county or counties. It shall cooperate with the Division of Health of the Department of Public Health and Welfare or its successors and shall be empowered to enter into contracts and agreements with state and federal health authorities for the furtherance of all health activities, except as hereinafter prohibited. All personnel for the operation of the public health center shall be appointed

and their compensation shall be fixed by the official organization. It shall have power to formulate, adopt and require such rules and regulations as may be needed for the operation of the center, not inconsistent with the laws of the state. It shall have exclusive control of the expenditures of all moneys collected to the credit of the Health Center Fund provided that all moneys received for such health center shall be deposited in the treasury of the county to the credit of the health center, and paid out only upon warrants ordered drawn by the county court of said county or counties upon the properly authenticated vouchers of said official organization."

(Underscoring ours.)

The qualifications of personnel to be employed in county health centers are set forth in Laws of Missouri, 1945, page 971, and read as follows:

Section 6. "The qualifications of all persons employed in the operation of said health center shall be at least equal to the minimum standard of qualifications as set forward by the Missouri State Board of Health or its successors for positions of like importance and responsibilities."

From the above two sections, it is very apparent that the personnel in public health centers are to be appointed by the official organization in charge of said centers, and the only restriction placed thereon is that in Section 6, supra, wherein such personnel must possess qualifications at least equal to the minimum standards of qualifications as set forth by the Division of Health for like positions.

The application of the State Merit System is limited to certain state departments as evidenced by provisions of the statute found

in Laws of Missouri, 1947, Volume I, page 376, which reads as follows:

"(b) The provisions of this act shall apply to all offices, positions and employees of the State Department of Public Health and Welfare, the State Department of Corrections, and the Division of Employment Security of the Department of Labor and Industrial relations, except such offices, positions and employees within the above named agencies as are herein specifically exempted."

Thus, it is apparent that the State Merit System Act was never intended to apply to employment of personnel in county health centers since separate provisions have been made for the employment and compensation of such personnel. The State Merit System Act is clearly limited to state departments.

CONCLUSION

Therefore, it is the opinion of this department that the State Merit System Act is not applicable to county public health centers, and the official organization of such centers has the authority to appoint and fix the compensation of all personnel needed for the operation of the public health center.

Respectfully submitted,

JOHN R. BATY Assistant Attorney General

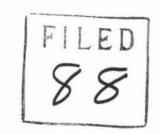
APPROVED:

J. E. TAYLOR Attorney General SEWERS: TAXATION FOR CONSTRUCTION AND MAINTENANCE:

City of the third or fourth class may levy a tax upon property within its corporate limits to pay for a public sewer system although some of the persons thus taxed do not receive service from the system because sewerage mains have not been laid adjacent to their property.

April 15, 1949

Mr. Cecil T. Taylor Representative, Shelby County Missouri House of Representatives Capitol Building Jefferson City, Missouri



Dear Mr. Taylor:

This office is in receipt of your recent letter in which you request an opinion on the following matter:

"Mr. A. owns property within the corporate limits of a city which has its own municipally owned light and water plant. Several of the residents of the city who reside within the corporate limits have, for a period of several years, asked for sewer and water mains to be laid adjacent to their homes so that they could use said facilities. So far the city has refused to do this, but all this time have been charging these residents the regular water and sewerage rates which they charge others who have had these facilities made available to them."

Following the receipt of this letter this office requested you to clarify the above and in reply you stated further:

"The city charges Mr. A \$15.18 sewer tax per year for two years, to run for twenty years. Water main runs in front of house but no sewer line in front of house. Will not take water until sewer main is laid in front of house.

"When bond issue was voted people were told that both water and sewer mains would be laid in front of homes."

From the above we deduce that your question relates to public sewer systems.

You do not state whether the city to which you refer is one of the third or fourth class. We will, however, consider

the law as it is applicable to both of these classes of cities.

Therefore, the question which you present for our consideration i: Does a municipality have the power to tax a resident of the city to pay for a public sewer system within the city although the resident who is taxed does not receive service from the public sewer system because sewer lines have not yet been laid adjacent to his home?

In answer to the above we direct your attention to Section 6968, Mo. R. S. A., which section relates to sewer systems in cities of the third class. That section reads:

"The council shall have power to cause a general sewer system to be established, which shall be composed of four classes of sewers, to wit: lic, district, joint district and private sewers. Public sewers shall be established along the principal courses of drainage, at such points, to such extent, of such dimensions and under such regulations as may be provided by ordinance, and these may be extensions or branches of sewers already constructed or entirely new throughout, as may be deemed expedient. The council may levy a tax on all property made taxable for state purposes over the whole city, to pay for the constructing, reconstructing and repairing of such work, which tax shall be called 'special public sewer tax,' and shall be such amount as may be required for the sewer provided by ordinance to be built; and the fund arising from said tax shall be appropriated solely to the constructing, reconstructing and repairing of said sewer."

We call your further attention in this connection to the case of J. M. Whitsett et al., appellants, v. City of Carthage, 270 Mo. 269. In this case the City of Carthage, a city of the third class, was sued in the circuit court by the plaintiff, Whitsett, to enjoin it from constructing a public sewer within the city. Prior to the filing of this action by Whitsett the defendant city had held an election which decided in favor of the construction of the proposed public sewer. The plaintiff in this case is the owner of about 160 acres of land within the city limits against which the defendant city proposed to issue special tax bills to pay for the construction of this said sewer. There was a showing by plaintiff that sewer service would not be made available to any part of his land following the construction

of the proposed sewer. A part of his complaint was that since this was so he should not be taxed for it. This makes the cited case analogous to the situation you present to us. The court, in this case, states, in part, as follows:

"It is not denied that the main sewer in question will, by means of district or lateral sewers, drain all of plaintiffs' lands when constructed and connected with it; but the main bone of their contention is that this main sewer will be of no benefit whatever to them until the lateral sewers are constructed and connected therewith, which are not authorized to be constructed by said ordinances, and therefore their lands will be taxed at \$36 per acre without any corresponding benefit; it is also contended that even though the lateral sewers were to be constructed, then their construction would cost approximately \$190 in addition per acre, making a total cost of about \$225 per acre for the construction of the main and lateral sewers.

"For the sake of argument, let us assume these figures to be correct (which is only an assumption, as the lateral sewers have not been ordered constructed, and consequently no plans or specifications therefor have been made, nor have estimates and bids been made of the cost of furnishing the materials and performing the labor necessary for their construction), then it is apparent that from this record there is no present necessity for the lateral sewers and we must presume that the city council will not violate its duty and order their construction in the absence of such necessity; however, should it so do then and not now, would be the proper time to challenge the reasonableness and validity of an ordinance ordering their construction.

"Under the foregoing view of the case we have only to do with the construction of the main sewer in question, the only one ordered constructed. It may for argument's sake be conceded that the plaintiff's property will not, at the present, receive as great a relative benefit from this sewer as will the other residences in that part of the city; but that is due to the fact that their property is not so densely populated and consequently that part of their farms and truck patches not used for residence purposes does not need such drainage. But that is not all that is in this case; every person in this State and country holds his property subject to the laws providing for the public health, safety, morals and general welfare,

and, if taken or damages for any one or more of those purposes, then he is entitled to just compensation therefor; likewise, his property must bear its just portion of the cost and expense of securing that protection. Both of those propositions are elementary; and it cannot be disputed that the main sewer in question is of great necessity for the preservation of the public health of the entire western portion of the city; not only that part of it densely populated is benefited, but also that part occupied by the plaintiffs. one could seriously contend that the deposit of the refuse of that part of the city into vaults or the discharge of it upon the surface of the ground, so as to find its way to Spring River through or along the natural draws or depressions before mentioned, would be, and, as the evidence shows, is, a continuing menance to the public health, especially to all that part of the city including the plaintiffs. The public health is menaced and endangered by the aggregation of filth and refuse of the entire district, and is not limited to accumulations thereof upon or about each separate lot or tract of ground located We know from the laws of gravity, obsertherein. vation and experience, if not removed and cared for, will seep through the earth and drain down hill to the lower levels, and there become more poisonous, sickly and deathly than upon the higher grounds; this is true for the reason that the rains, snows and seepage will dispose of and carry much of it to the low places; so from a sanitary point of view, the disposition of the sewage of that part of the city lying higher up the slope than the property of the plaintiffs, then it is for the people residing above them. The chief purpose of a sewer system is the protection of the public health, and as we have seen, the plaintiffs' property will be equally protected in that regard by the sewer in question; and it is not therefore true, as contended for by counsel, that they are not benefited thereby, or that they are not equally protected with the other residents of that part of the city.

"Counsel for plaintiffs seem to think that the benefits to real estate only can be considered in the construction of sewers. While in a technical sense that may be true, but in a practical sense, it is only indirectly true; in a primary sense, the benefits are conferred upon the entire people of the district, and secondarily upon the real estate, by virtue of its being thereby made more desirable for business and residential purposes, which correspondingly increases the value of the land--presumably equal to the cost of construction, but perhaps not exactly in all cases.

"The lateral sewers, as previously shown, will receive the refuse of the upper part of the city, and discharge it into the main sewer, and thereby prevent the same from being discharged into natural and open drains running through or near plaintiff's property, and thereby prevent it from seeping through the ground and otherwise flowing upon plaintiffs' property, which, if not thus prevented, would render their section of the city unsanitary; and in that way the plaintiffs will receive as much or more indirect benefit from said lateral sewers as the densely populated part of the district will from that part of the main sewer which runs through or near plaintiffs' property; and if it is a hardship upon the plaintiffs to have to contribute to the payment of the main sewer before they connect their lateral sewers with it, then they are more than compensated therefor by receiving the benefits of the lateral sewers located above, as previously mentioned. The cost of the construction of the latter, according to plaintiffs' own figures, is far in excess of the cost of the construction of the main sewer; this throws some light upon the relative benefits received by each section of the district. In that way plaintiffs receive the benefits of the main and lateral sewers located above them, without paying one penny therefor, and when they construct their lateral sewers and connect them with the main sewer in question, then the entire district will be completely drained with equal benefits and equal cost; if any difference in cost, it is in favor of the plaintiffs, because they will not be required to construct their part of the lateral sewers until the necessity of that section of the district demands it.

"The law does not require all of the lateral sewers of a drainage district to be constructed at the same time; they may be constructed as the necessities therefor may demand. (City of St. Joseph to use of Gibson v. Owen, 110 Mo. 445.)"

We call your further attention to Section 7181, Mo. R.S.A. which section has reference to cities of the fourth class. This section states:

"The board of aldermen shall have power to cause a general sewer system to be established, which shall be composed of three classes of sewers, to wit: Public, district, and private sewers. Public sewers shall be established along the principal courses of drainage, at such points, to such extent, of such dimensions and under such regulations as may be provided by ordinance, and these may be extensions or branches of sewers already constructed, or entirely new throughout, as may be deemed expedient. The board of aldermen may levy a tax on all property made taxable for state purposes over the whole city, to pay for the constructing, reconstructing and repairing of such work, which tax shall be called 'special public sewer tax,' and shall be such amount as may be requireed for the sewer provided by ordinance to be built; and the fund arising from said tax shall be appropriated solely to the constructing, reconstructing and repairing of said sewer. R.S. 1929, par. 7031."

In the case of Union Trust Co. v. Pagenstecher, 221 Mo. 121, the court held that a general municipal tax could be levied upon all persons and property within the city limits to pay for a public sewer system. In this case there was no issue as to whether or not the property of the plaintiff would receive service from said sewer system and there was no showing as to whether it would or would not. The significant thing about this case is its holding that such a general tax could be levied for the erection of a public sewer system. In this connection the court said:

"So that when the three sections above mentioned, viz., sections 5969, 5970 and 5971, are read together, it is apparent that the 'special public sewer tax' referred to in section 5969, is a general municipal tax, and in no sense a special assessment. We do not therefore have to depend upon other indicia of a general tax, but find evidence of the character of this tax in the face of the law itself. The ordinance we have before us conforms to the statute, and we hold that it provides for a general municipal tax, although such tax is set apart for a special municipal purpose. This tax thus appears to be general in the sense of being levied upon all property alike within the domain

Mr. Cecil T. Taylor

"of the taxing authority, but special in the sense only that it is levied for a special purpose or fund. * * * * * * * "

CONCLUSION

In view of the above it is the opinion of this office that a city of the third or fourth class can levy and collect sewer taxes to pay for a public sewer from persons within the corporate limits of the city although sewer mains have not been so constructed as to make sewer service available to the persons thus taxed.

Respectfully submitted,

HUGH P. WILLIAMSON Assistant Attorney General

APPROVED:

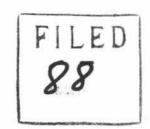
J. E. TAYLOR Attorney General PURCHASING AGENT: STATE CONTRACTS:

Lease of premises for and in behalf of state departments must be negotiated by State

Purchasing Agent.

October 28, 1949

Mr. Joy O. Talley, Director Vocational Rehabilitation Division Department of Education 1 Governor Hotel Jefferson City, Missouri



Dear Sir:

Your letter at hand requesting an opinion of this department. In your letter you request to be informed whether or not a lease of offices in the Chamber of Commerce Building, St. Louis, Missouri, can be legally broken so as to permit your offices to move to another location. Examination of the lease, which was subsequently submitted to us upon request, shows that the premises in question were leased for a term beginning September 1, 1949, and ending August 31, 1951; that it was executed by one Arthur A. Lagemann as lessor and State of Missouri, Vocational Rehabilitation Division, Department of Education as lessee. The lease was signed by you for and in behalf of the lessee.

It is a requirement of the law of this state that all leases for state departments must be negotiated by the State Purchasing Agent. Thus, Section 64, page 1450, Laws of Missouri, 1945, provides:

"The purchasing agent shall purchase all supplies for all departments of the state, except as in this act otherwise provided. The purchasing agent shall negotiate all leases and purchase all lands, except for such departments as derive their power to acquire lands from the constitution of the state."

The above section is almost identical with the old Section 14590, R.S.Mo. 1939, which was a part of the State Purchasing Agent Act that was repealed by the 63rd General Assembly with the enactment of Senate Bill No. 450.

In referring to the State Purchasing Agent Act, and particularly Section 14590 thereof, the Supreme Court of

Mr. Joy O. Talley

Missouri, in the case of State ex rel. Armontrout vs. Smith, 182 S.W. (2d) 571, 353 Mo. 486, said at S.W. 1.c. 574:

"* * * The State Purchasing Agent Act (Secs. 14590, 14592) also requires purchases of supplies (as well as leases) for all departments to be made through the purchasing agent. * * *"

It is therefore apparent that the lease contract in question was not executed by the lessee, which is a department of our state government, with statutory authority and, consequently, the contract is null and void and not binding upon the state. To permit its enforcement would be in violation of the statute.

In the case of Sager vs. State Highway Commission, 160 S.W. (2d) 757, 349 Mo. 341, action was instituted by the plaintiff, a contractor, to recover additional compensation for extra work performed under a contract that had been orally changed by assistant engineers in the State Highway Department. In holding that there was no liability under any agreement or contract made by the assistant engineers, the court, at S.W. 1.c. 763, said:

"* * * Plaintiff now attempts to obtain payment upon a different basis on an oral agreement by assistant engineers (about which the evidence is very indefinite and uncertain) to set aside the applicable provisions of the contract. Therefore, this is not a case of mere irregular or defective exercise of authority possessed, but is a case of no authority whatever for such assistants to change the terms of the written contract by oral agreements. See Campbell Building Co. v. State Road Commission, 95 Utah 242, 70 P. 2d 857, loc. cit. 864. To permit this to be done would be to sanction the violation of the statutory and constitutional provisions to which we have hereinabove referred; and since the assistant engineers had no authority to make such a contract, it cannot be enforced by estoppel. * * *"

Again, in the case of AEtna Ins. Co. vs. O'Malley, 124 S.W. (2d) 1164, 343 Mo. 1232, the Supreme Court, in discussing the power of a state officer to enter into valid contracts, said at S.W. 1.c. 1166, 1167:

"* * * Before a state officer can enter into a valid contract he must be given that power either by the Constitution or by the statutes. All persons dealing with such officers are charged with knowledge of the extent of their authority and are bound, at their peril, to ascertain whether the contemplated contract is within the power conferred. Such power must be exercised in manner and form as directed by the Legislature. State v. Bank of the State of Missouri, 45 Mo. 528; State to the Use of Public Schools, etc., v. Crumb, 157 Mo. 545, 57 S.W. 1030; State ex rel. Blakeman v. Hays, 52 Mo. 578; State v. Perlstein. Tex. Civ. App., 79 S.W. 2d 143; 59 C.J., section 285, page 172, section 286. In the last citation the author says: 'Public officers have and can exercise only such powers as are conferred on them by law, and a state is not bound by contracts made in its behalf by its officers or agents without previous authority conferred by statute or the constitution, unless such authorized contracts have been afterward ratified by the legislature. An agreement not legally binding on the state may, however, impose a moral obligation. The doctrine of estoppel, when invoked against the state, has only a limited application, even when an unauthorized contract on its behalf has been performed, and thereby the state has received a benefit, and so it is held that a state cannot by estoppel become bound by the unauthorized contracts of its officers; nor is a state bound by an implied contract made by a state officer where such officer had no authority to make an express one.'"

Under the holding of the above case, we are constrained to the view that the contract in question not being executed in the manner and form as directed by the Legislature, but was executed without authority that the state is not expressly nor impliedly bound. It would therefore follow that the local office of the Division of Vocational Rehabilitation, Department of Education, could move to another location without incurring any liability on the state under the terms of the lease contract.

CONCLUSION

In the premises, it is our opinion that a lease of premises executed by the Division of Vocational Rehabilitation, Department of Education, State of Missouri, or any officer connected therewith as lessee, is not binding upon the state for such leases are required by law to be negotiated by the State Purchasing Agent.

Respectfully submitted,

RICHARD F. THOMPSON Assistant Attorney General

APPROVED:

J. E. TAYLOR Attorney General NOTARIES PUBLIC:

A Notary Public cannot legally notarize documents under any name other than his or her legal name.

February 15, 1949

2.16

Honorable Walter H. Toberman Secretary of State Capitol Building Jefferson City, Missouri

Attention: Mr. U. A. McBride

Dear Sir:

This office is in receipt of your request for an official opinion upon a question propounded to your office in a letter from Ben Nordberg, Clerk of the County Court of Jackson County, Missouri. Mr. Nordberg, in his letter, inquires:

"Ratherine Quigley of this city holds a notary commission under the name of Katherine Sevier, for the reason that at the time she was thus commissioned she carried her married name of Sevier.

"Since that time she has secured a divorce and has taken back her maiden name and wishes to know if she can still legally notarize documents under the name of Sevier, rather than her now legal name of Quigley."

We would call your attention to Section 13363, R. S. Mo. 1939, which states:

"Every notary public shall provide a notarial seal, on which shall be inscribed his name, the words 'notary public,' the name of the county or city, if appointed for such city, in which he resides and has his office, and the name of the state; shall designate in writing, in any certificate signed by him, the date of the expiration of his commission.

No notary public shall change his seal during the term for which he is appointed and he shall authenticate therewith all his official acts, and the record and copies, certified by the proper custodian thereof, shall be received in evidence.

It will be noted that the above section specifically says that the notary public shall provide a notarial seal on which shall be inscribed his name.

Katherine Sevier, to whom the notary commission in this case was issued, now bears the name of Katherine Quigley, and for her to continue to notarize instruments with a notarial seal on which is inscribed the name of Katherine Sevier would obviously be in violation of Section 13363, since Katherine Sevier is not now her legal name. It is, therefore, our opinion that Katherine Quigley cannot legally notarize documents under the name of Katherine Sevier.

In regard to the issue as to the proper course of action to be taken to rectify the above situation we would call your attention to Volume 5, 1924-1925 Pa. District and County Reports, page 66, from which case found therein we quote:

"On May 15, 1923, Boleslaw John Bielski filed a petition in the Court of Common Pleas of Allegheny County for a change of his name. After publication and compliance in all other respects with the act of assembly governing this procedure, a decree was entered by the court changing the name of petitioner to that of Robert John Billings.

"At the time the petition was filed Bielski was an interne in a hospital at Phtsburg, and about to take his State examination for a license to practice medicine. He filed his credentials in the name he the bore, Boleslaw John Bielski, as at that time then decree had not been entered changing his name.

"After the decree was entered, and before his license was issued, he forwarded a certified copy to the Department of Public Instruction, with a request that his license be issued in the name of Robert John Billings. He was notified by your board that it would be impossible to issue him a license in any other name than that under which his credentials were filed.

"The question arises: Can a license be issued to him in the name of Robert John Billings, the name he now legally bears?

"In the case of a notary public who has had his name changed by decree of court, this department has held that the commission was issued to a person certain, and there was no reason why that person should not have a commission in the new name. The commission was issued to the person and not to the name. The same reasoning applies to a license issued to practice medicine. The person to whom a license was issued having changed his name by legal procedure, in a way recognized and approved by the law, he should not be deprived of any of his rights for doing so. He is entitled to all the rights which were his under his old name, and one of these rights was to practice medicine, and he ought not, as Robert John Billings, to be compelled to practice under a license issued in the name of Boleshaw John Bielski.

"A man's name is the mark by which he is distinguished from other men, and as Robert John Billings is now the legal name of him who formerly bore the name of Boleslaw John Bielski, he should be given a license in his legal name, for the only thing the law looks to is the identity of the individual.

"Probably the leading case on a change of name is Petition of Snook, 2 Pitts. Repr. 26, and in that case the court, speaking of a changed name, held: 'Any contract or obligation he may enter into, or which others may enter into with him by that name, or any grant or devise he may hereafter make by it would be valid and binding, for, as an acquired known designation, it has become as effectually his name as the one he previously bore.'

"In Clouser v. Snyder, 8 Berks Co. L.J

71, it is laid down, 'that a man may adopt any name he chooses, and that his acts and contracts by such name will be legal."

"You are, therefore, advised that if Robert John Billings returns the license issued to Boleslaw John Bielski, together with a certified copy of the decree of the court changing his name, if such decree is not already filed in the Department of Public Instruction, while it is not obligatory, it is legal and only fair that a new license should be issued to Robert John Billings to practice medicine in this Commonwealth under that name."

In the light of this decision, and in the absence of Missouri decisions upon this point, it would be our opinion that a new commission be issued to Katherine Quigley by the Governor, without charge to her.

CONCLUSION

It is the conclusion of this office that a notary cannot legally notarize documents under any other than his or her legal name.

Respectfully submitted,

APPROVED:

HUGH P. WILLIAMSON Assistant Attorney General

J. E. TAYLOR Attorney General

HPW:mw

SECRETARY OF STATE: Deed may be withdrawn for recording.

89

February 17, 1949

2.18

Hon. Walter H. Toberman Secretary of State Jefferson City, Missouri

> Attention: Mr. J. Paul Markway Chief Clerk

Dear Sir:

We have received your request for an opinion of this department, which request is as follows:

"We are enclosing herewith a copy of a letter from Brigadier General John A. Harris asking advice as to whether or not this office can send a National Guard Armory deed to a county recorder for recordation. Details are explained in said attached copy of his letter.

"Section 13002 R. S. Mo. 1939 states, 'He (the Secretary of State) shall not permit any original roll, paper or public document filed in his office to be taken out of it unless called for by a resolution of either or both houses of the general assembly, or for the examination of the executive.'

"In view of this, we respectfully request your opinion as to whether or not this deed may be sent for recordation."

The letter from General Harris, to which you refer, explains that the deed was entered into on August 24, 1938, between Doniphan Consolidated School District No. 1 of Ripley County and the State of Missouri; it was filed in the office of Secretary of State without having been recorded in Ripley County where the land involved is located; and the Recorder

of Ripley County has requested that the original on file in your office be submitted to him for recording, in view of Section 13178, R. S. Mo. 1939, which provides that where an instrument is offered for a record which is more than one year old, the instrument must remain on file in the office of the recorder for a period of one year.

The Secretary of State is the custodian of such records and documents as provided by law (Section 14, Article IV, Constitution of 1945). Section 12995, R. S. Mo. 1939, reenacted Laws of 1945, page 1725, provides that the Secretary of State shall "have the safe-keeping * * * of all public records, including surety bonds except of secretary of state, rolls, documents, acts, resolutions and orders of the general assembly; keep a register of all commissions issued, the official acts of the governor, and, when necessary, attest the same."

We find no statutory provision in effect either at the present or at the time the deed in question was executed requiring such deed to be filed in the office of the Secretary of State to become a public record.

On the other hand, the records of the various recorders' offices in this state are the primary basis of information regarding the ownership of real estate. Section 3426, R. S. Mo. 1939, provides:

"Every instrument in writing that conveys any real estate, or whereby any real estate may be affected, in law or equity, proved or acknowledged and certified in the manner hereinbefore prescribed, shall be recorded in the office of the recorder of the county in which such real estate is situated."

Section 3427, R. S. Mo. 1939, provides that every such instrument shall, from the time of filing, impart notice to all persons of its contents.

Section 3428, R. S. Mo. 1939, provides that no deed shall be valid, except between the parties thereto and persons with actual knowledge, until it has been deposited with the recorder for record.

We feel that it was not the intention of the Legislature in enacting Section 13002, R. S. Mo. 1939, prohibiting the removal of any original roll, paper or public document from the office of the Secretary of State unless called for by a resolution of either or both houses of the General Assembly or for examination of the Chief Executive, to prohibit a withdrawal of an instrument, such as the one here in question, which was not required by any law to be filed with the Secretary of State and which was filed there erroneously prior to being recorded as required by law. Rather, we feel that the intent of the Legislature, and the purpose of the section which you have cited, is to preserve all the documents which are required to be filed with the Secretary of State and for the authenticity of which the Secretary of State is primarily responsible.

We feel that the recorder is justified in requiring the original for recording, in view of the fact that Section 13178, R. S. Mo. 1939, requires the recorder to retain in his office, for one year after recording, any instrument of writing affecting real estate which purports to have been signed and acknowledged more than twelve months prior to the time the same is presented for record. Section 13179, R. S. Mo. 1939, makes the failure of the recorder to comply with Section 13178 a misdemeanor.

Conclusion.

Therefore, this department is of the opinion that Section 13002, R. S. Mo. 1939, dealing with the removal of public documents from the office of Secretary of State, is not applicable to an instrument conveying real estate to the State of Missouri which was filed in the office of the Secretary of State and which was not recorded in the county in which the real estate affected by the conveyance is located, and that such deed may be withdrawn from the office of the Secretary of State for the purpose of properly recording it.

Respectfully submitted,

APPROVED:

ROBERT R. WELBORN Assistant Attorney General

J. E. TAYLOR Attorney General

CORONERS:

Vacancy created in office on failure of coroner-elect to give bond. Incumbent coroner entitled to hold over in office until vacancy filled.

2-18-49

2.18

FILED 89

Honorable Walter H. Toberman Secretary of State Jefferson City, Missouri

> Attention: J. Paul Markway Chief Clerk

Dear Sir:

This is in reply to your letter of recent date requesting the opinion of this department on the following set of facts:

A coroner was elected for the County of Ozark, Missouri, at the recent general election, November 2, 1948, but on December 31, 1948, said coroner-elect stated that he would not give bond as required by law. The specific question is whether or not the coroner who has held office during the past term should hold over in said office.

Prior to the 1945 Constitution of Missouri the coroner was a constitutional officer. The 1945 Constitution made no provision for this office and for that reason the Sixty-Third General Assembly created the office of coroner in each county in the state, as will appear from the Laws of Missouri 1945, page 1404, Section 2:

"At the general election in the year 1948, and every four years thereafter, the qualified electors of the county at large in each county in this state shall elect a coroner who shall be commissioned by the Governor, and who shall hold his office for a term of four years and until his successor is duly elected or appointed and qualified. Each coroner shall enter upon the duties of his office on the first day of January next after his election; Provided, that the term of office of persons holding the office of coroner at the time this act shall take effect shall not be vacated or affected thereby."

According to its own terms it is clear that the above section was not made applicable until the general election in the year 1948, and was not intended to control previous terms of office. Further, Section 3 of the Schedule of the 1945

Constitution provides that the terms of all persons holding public offices to which they were elected or appointed at the time the 1945 Constitution shall take effect shall not be vacated or otherwise affected thereby. Therefore, in reaching a conclusion in this matter we must consider the applicable provisions of the 1875 Constitution of Missouri. Section 10, Article 9, creating the office of coroner in each county provided in part as follows:

"There shall be elected by the qualified voters in each county on the first Tuesday next following the first Monday in November, A. D. 1908, and thereafter every four years, a sheriff and coroner. They shall serve for four years and until their successors be duly elected and qualified, unless sooner removed for malfeasance in office."

Section 5, Article 14, further provided:

"In the absence of any contrary provision, all officers now or hereafter elected or appointed, subject to the right of resignation, shall hold office during their official terms, and until their successors shall be duly elected or appointed and qualified."

It is clear from the above provisions of the 1875 Constitution that the term of office of coroner was for four years and until a successor be duly elected and qualified.

The general rule of law in such cases is found in 46 Corpus Juris, "Officers", Section 111, Page 969, as follows:

"In many states it is provided by the Constitution or by statute that officers shall hold over after the expiration of their terms until their successors are elected or appointed and have qualified. Under a provision that officers shall hold over until their successors are "elected" and qualified, the officer holding over is in all respects a de jure officer, and the expiration of the term does not produce a vacancy."

See also 43 American Jurisprudence "Public Officers", Section 161, Pages 19 and 20.

The above rule is adopted by the Courts of this state. In State ex inf. Hulen vs. Brown, 274 S. W. 965, 220 Mo. A. 468, the Kansas City Court of Appeals said at Page 967 (S.W.):

"The law is well settled that where a public officer is elected or appointed to hold office for a definite period, and until his successor is appointed or elected and qualified, failure to appoint or elect a successor at the end of such period does not work a vacancy. State ex rel Lusk, 18 Mo. 333; State ex rel Stevenson v. Smith, 87 Mo. 158. It follows that the incumbent properly holds until his successor is elected or appointed and qualified, and it is then only that his term expires. State ex rel Robinson v. Thompson, 38 Mo. 192; State ex rel v. Ransom, 73 Mo. 78.

"The law under which appellants were appointed fixed their terms of office at one year, and contemplated that at the end of that time new appointments would be made. But, since the appointing power might not be promptly exercised, to prevent a vacancy the law provided for the incumbents to hold over until their successors were appointed and qualified. This is a wise rule as applied to public officers, for thereby the public is protected from possible evils naturally attendant upon a situation wherein neglect and waste might result. This contingency, as contemplated by the law, enters into every such appointment, and it must be concluded that the time an incumbent holds over the designated period is as much a part of his term of office as that which precedes the date when the new appointment should be made. The authorities are uniform on this rule, and we think there can be no question about it."

In the case of Langston et al vs. Howell County, 79 S. W. (2nd) 99, the appointment of a county highway engineer for a period of one year was considered. In that case a new highway engineer was not appointed after the expiration of the one year term. The Supreme Court of Missouri held, even in the absence of language in the appointment to the effect that said appointment extended until a successor was appointed and qualified, that said county highway engineer was entitled to hold his office until his successor was appointed and qualified.

Section 13228, Revised Statutes of Missouri, 1939, provides that all coroners before they enter upon the duties of their office shall take an oath and shall give bond to the State

of Missouri in the penalty of at least \$1000.00, conditioned for the faithful performance of the duties of that office. The foregoing is the expression of the law in Missouri on this general subject.

However, it is further provided in Section 13230, Revised Statutes of Missouri, 1939, that if a coroner-elect does not give bond and qualify within twenty days after his election his office shall be deemed vacant. In the present case the coroner-elect has not given bond as provided by law and, therefore, has not qualified for said office.

We must now determine the effect of Section 13230, supra, in such case. The prevailing view in Missouri seems to be that the time requirement on giving bond is directory rather than mandatory, and further that such failure to give bond within the time required by statute does not create a vacancy or amount to a forfeiture of office. The rule is found in 46 Corpus Juris, "Officers", Section 95, Page 963, as follows:

"" " " On the other hand it has been held that a provision that an office shall become vacant upon a neglect or refusal to qualify within the time prescribed is merely directory and will not create a vacancy. And the same rule has been applied where the statute provides that an officer who fails to file his bond shall be deemed to refuse such office."

The above ruling is recognized by the Missouri Courts. The leading case in Missouri on this matter is State ex rel Attorney General vs. Churchill, 41 Mo. 41, which is cited and relied on in many later cases. The Court there said at Pages 42 and 43:

"It is stated that Jasper N. Norman was duly elected treasurer of the County of Laclede at the election in November, 1866, received his certificate of election, gave his bond, which was approved by the County Court and ordered to be filed, and took the oaths required by law, which were enclosed in his certificate or commission; but that a few days afterwards, on motion of the county attorney, the County Court made an order rescinding the approval of the bond, and declaring it annulled, for the reason that it had not been offered and filed within ten days after the election, as required by the statute - G.S. 1865, Ch. 38, Sec. 5. The court also declared the office vacant and proceeded to appoint the defendant county treasurer, who gave the required bond, was duly qualified, and entered upon the duties of his office.

"We think the court erred in this proceeding. The bond was not void, nor voidable, merely because not presented and filed within the ten days. This provision of the statute is directory only. The matter of time was not essential to the validity of the bond, nor a condition

The time not being of the essence of the thing required to be done here, it was not material.

Rex v. Lexdule, 1 Burr. 497; Sedgw. Stat. & Const. Law, 368-74. When a sheriff was required to give bond within twenty days after his election, it has been held that the statute as to the time of giving the bond was directory merely, and that the failure to give the bond within that time did not forfeit his title to the office. People v. Holly, 12 Wend. 481. We are of the opinion that the orders of the court vacating the bond, declaring the office vacant, and appointing the defendant treasurer, should be regarded as having been done without authority of law and as mere nullities."

We believe, however, that the Churchill case can not be considered as authority on the particular facts with which we are concerned here.

The Churchill case was decided in 1867 and involved the construction of G. S. 1865, Chap. 38, Sec. 5 - which was sub-stantially the same as Section 13795, Revised Statutes of Missouri, 1939 now appears. Section 13795 provides that a person elected or appointed county treasurer shall give bond within ten days after his election or appointment. No penalty is attached by that section for the failure to give bond. Section 13795, Revised Statutes of Missouri, 1939, was originally enacted in 1879, a later date than that upon which the Churchill case was decided. Said Section provides that the county court shall at any semiannual settlement with the treasurer or at any other time may, if the treasurer's bond be deemed insufficient, order him to give a new bond or additional security. It is further provided that if such new bond or additional security be not given within twenty days after the court's order that the office of treasurer shall thereby become vacant. It is evident then that the factual situation presented in the Churchill case is not analogous with the present set of facts in that the statute considered there did not provide a penalty if the provisions regarding time of filing bond were not carried out. In the present case it is provided that the coroner shall give a bond within twenty days after his election and that if he fails to give bond within the required time as provided by law his office shall be deemed vacant.

We must give effect to Section 13230, supra. Where a statute prescribes a time within which a person, in order to be inducted into office, must file a bond and provides that non-compliance with this provision shall result in the office be-

coming vacated and forfeited. Compliance with the statute is mandatory and failure to comply will absolutely forfeit the right to the office.

In State vs. Heath, 132 S. W. (2nd) 1001, the Supreme Court of Missouri stated at Page 1003 as follows:

"It is further agreed that the respondent signed the oath of office when taken in the school meeting and also signed a written oath when sworn by the justice of the peace. This court has said; "If a statute merely requires certain things to be done and nowhere prescribes the result that shall follow if such things are not done, then the statute should be held to be directory". State ex inf. McAllister ex rel. Lincoln v. Bird, 295 Mo. 344, 244 S. W. 938, 939. Likewise, it is said: "Statutes fixing the time within which school officers must qualify are, as a general rule, regarded as directory to the extent that mere delay in qualifying within the time prescribed does not, of itself, cause a vacancy in the office, unless there is contained in the statute an express provision to that effect." 56 G. J. 309, Sec. 182; see also 46 G. J. 962, Sec. 95; 22 R. C. L. 451, Sec. 108."

The same conclusion is reached in Dawson vs. Hetzler, 74 3. W. (2nd) 488, where it was said at Page 489:

"Statutory provisions in regard to the time of doing an act are generally to be taken as mandatory where a consequence is attached to a failure to comply therewith. Shaw v. Randall 15 Cal. 385."

Similar conclusions are also reached in State vs. Schade, 167 S. W. (2nd) 135, 1. c. 141, and Ousley vs. Powell, 12 S. W. (2nd) 102, 1. c. 103.

The conclusion that Section 13230, supra, is mandatory in requiring the coroner to give bond within twenty days after the election is supported in 18 C. J. S. "Goroners", Section 7, Page 289-290:

"A vacancy in the office of coroner may occur where the incumbent notoriously absconds, or where a coroner-elect fails to file oath and furnish bond within the statutory period; but the death of a coroner-elect before his qualification does not create a vacancy, and the incumbent continues in office until the next election."

Therefore, a vacancy was created in the office of Coroner of Ozark County when the coroner-elect failed to give bond as provided by law.

A further question now arises concerning the authority of the incumbent coroner to hold over in said office. In this connection we cite 46 C. J. "Officers", Section 111, Page 969, as follows:

"It has been held that a provision that an officer shall hold until a successor is "appointed" and qualified, while recognizing the fact that there might be some delay in the appointment, equally and fully recognizes the right to appoint at any time after the term, although there is authority to the contrary. So a provision that officers shall continue in office until their successors are duly qualified is not a limitation upon the power to fill vacancies."

And further in Section 13, Page 970:

"The word "successor", in a provision of the character under consideration, means a successor legally chosen, and duly qualified; and where a successor elected or appointed to office dies before the time for qualifying for the office, there is no vacancy in the office, but the then incumbent holds over. Furthermore, the rule is applicable where a successor refuses to qualify, notwithstanding a statute providing that every office shall become vacant on the incumbent's refusal so to do."

The further rule that there is a presumption against a legislative intent to create a condition which may result in an office becoming vacant is also set out in 46 C. J. "Officers", Section 117, Pages 971 and 972:

"The law abhors vacancies in public offices, and courts generally indulge in a strong presumption against a legislative intent to create, by statute, a condition which may result in an executive or administrative office becoming, for any period of time, wholly vacant and unoccupied by one lawfully authorized to exercise its functions."

It is, therefore, indicated by the general law on this subject that in this particular factual situation the incumbent coroner should hold over in said office until the vacancy has been filled according to law. That this result is consistent with the existence of a vacancy in the office of coroner is shown by the authorities previously cited herein and by the court in the case of State ex inf. vs. Williamson, 222 Mo. 268, which holds that an office becomes vacant when the regular term expires and that an appointment may be made at any time thereafter notwithstanding the ruling that the officer may hold over and that such right to hold over is by sufferance rather than by any intrinsic title to the office. In the Williams case we find the following discussion at Page 282:

"In the case at bar the Act of 1901, as has been repeatedly stated, did not designate the date of the beginning or ending of the term, but the Governor, who was fully vested with appointing power to fill such office, did fix the date of the ending of the term of the relator. By the designation as made by the Governor of the ending of the term, it follows that relator's term expired on May 13, 1909, unless there are provisions in the statute which would longer continue such term.

III

"This brings us to the consideration of the statute which would authorize the relator to hold and enjoy the office of factory inspector beyond the end of his term, May 13, 1909. The only provision of law authorizing the relator to hold beyond the designated end of his term, May 13, 1909, are the terms employed in the statute providing that he shall hold "until his successor is appointed and qualified". While this language recognized the fact that there might be some delay in the appointment and qualification of a successor, it equally and fully recognizes the right of the Governor to appoint at any time after the term.

" * * * For the purposes of appointment there was a vacancy in this office May 13, 1909. The law does not contemplate that there is a new beginning and ending of the term by each appointment, but the term becomes fixed by the first appointment under the act."

On this point we also city State ex rel Attorney General vs. Thomas, 102 Mo. 85, and State ex rel Withers vs. Stonestreet, 90 Mo. 361.

In view of the foregoing authorities we believe it is in keeping with the general public policy to hold that the incumbent coroner of Ozark County is entitled to hold over in said office until the vacancy created by the coroner-elect in failing to give bond within the required time is filled as provided by law.

CONCLUSION

Therefore, it is the opinion of this Department that the failure of the coroner-elect of Ozark County, Missouri, to give bond as provided by law created a vacancy in the office of coroner of said county. It is further the opinion of this Department that the incumbent coroner is entitled to hold over in said office until said vacancy is filled according to law.

Respectfully submitted,

DAVID DONNELLY ASSISTANT ATTORNEY GENERAL

APPROVED:

J. E. TAYLOR ATTORNEY GENERAL

DD/D

LIOUOR:

JUDGMENTS:

Intoxicating liquor may be sold under execution to satisfy a judgment for a debt.

April 9, 1949

Honorable B. C. Tomlinson Prosecuting Attorney St. Francois County Farmington, Missouri



Dear Sir:

This will acknowledge receipt of your request for an opinion which reads:

"I would like to get an opinion from your office with reference to the following situation:

"A is a licensed retail liquor dealer in St. Francois County and carries a stock of intoxicating liquors for sale in original packages. B has a judgment against A for debt on which an execution has been issued by the Magistrate. Is there any legal reason why the Sheriff may not make levy and sale of A's stock of liquors to satisfy the execution the same as he could do with respect to other personal property belonging to A?"

yolume 33, C.J.S., Section 23, lays down the general principle of law relative to the sale of intoxicating liquor under executions, that unless intoxicating liquor is specifically exempt from such executions, it is property and subject to sale and execution. Said section reads:

"On the ground that intoxicating liquors are property, and that they are not within any enumerated exception or exemption, it has been held that they are subject to levy and sale under execution on the same basis as any other property notwithstanding the existence of statutes regulating or prohibiting the sale of intoxicating liquors, execution sales not being deemed within the prohibition of such statutes. However, there is authority to the contrary, some courts holding broadly that such prohibitory statutes render intoxicating

liquors not subject to levy and sale on execution. Where the applicatory statute does not merely regulate or prohibit the sale of intoxicating liquor, but absolutely destroys the right of property therein, it is not subject to execution sale."

Also Volume 7, C.J.S., Section 74a, Subsection 10, page 249, lays down the principle, that where the keeping of intoxicating liquor is lawful, such property may be attached like any other property and reads:

"Where the keeping of intoxicating liquor is lawful, such property may be attached like any other property."

In Murphy v. St. Joseph Transfer Co., 235 S.W. 138, l.c. 139, the court in holding that intoxicating liquor lawfully acquired and kept, is protected by the laws affecting property rights as any other property, said:

"(2) This argument is neither conclusive nor convincing, for the reason that the laws and regulations above quoted apply exclusively to the sale of intoxicating liquors for beverage purposes. The record shows that the liquor in question was lawfully acquired, and it is a rule of law that liquors so acquired and kept are as much surrounded and protected by the laws affecting property rights as any other property."

Under Section 4884, Mo. R.S.A., in this state any person may possess intoxicating liquor providing that the container properly has affixed thereto stamps of the Director of Revenue, evidencing payment of fees and charges required under the Liquor Control Act.

Under Section 4898, Mo. R.S.A., it requires any person manufacturing, distilling, blending, selling or offering for sale intoxicating liquor within this state, wholesale or retail, to first procure a license from the Supervisor of Liquor Control. Apparently, it was not the legislative intent to include in Section 4898, supra, sale of intoxicating liquor under execution for the payment of debts, since such a sale would not be for wholesale or retail.

The Liquor Control Act specifically authorizes railroads and express companies doing business in this state to sell unclaimed or refused shipments of intoxicating liquor in the same manner as the sale of other unclaimed shipments without first procuring a license from the Supervisor of Liquor Control authorizing such sale. Furthermore, under Section 4912, R.S. Mo. 1939, it makes it unlawful to sell or to give away warehouse receipt or receipts of intoxicating liquor, without first securing the permission of the Supervisor of Liquor Control, which would indicate under the well established rule of statutory construction, that the expression of one thing is the exclusion of another, that it is not necessary to first obtain a license from the Supervisor of Liquor Control to sell intoxicating liquor under an execution.

We find no court decisions in this state directly in point, however, this identical question has been passed on in other jurisdictions. In Nutt v. Wheeler, 30 Vt. Rep. 436, 1.c. 439,440, the court in holding that intoxicating liquor lawfully held is subject to attachment and sale for debts said:

> "* * *We can not presume it for the sake of reversing a judgment of the county court. But it was said in the argument that this liquor was not subject to attachment, and that therefore the defendant can not justify the taking under his process.

> "But why not? It is assumed by the plaintiff's counsel that it is property, and held by the plaintiff for a lawful purpose, and if so, it should be protected in his hands, and subjected to his debts, in common with his other property. It could be sold on the execution for a lawful purpose, and we can hardly presume, in the absence of proof, an intent to sell it for an unlawful purpose, and thereby contaminate the attachment."

> > * * * * * * * * * *

In Fears et al. v. The State, 102, Ga. 274, the court in holding that intoxicating liquors are subject to sale under execution for payment of debts of the owner said:

> "* * * We have heretofore seen that liquors are property under the common law; that this right of property is not destroyed by legislation which prohibits a sale of such liquors; and being

property, they are subject to the payment of the debts of the owner. It must follow that a valid lien may be created thereon, and that the lien of a judgment rendered against the owner attaches in the same manner as it would attach to other property. The binding force of judgments rendered attaches to all the property of the defendant, both real and personal, from the date of such judgment, subject only to such exceptions as are made in our code. Civil Code, Sec. 5351.

- "* * * The laws in force impose substantially the same penalties for sales without license as are imposed by the act under consideration for making sales prohibited. It has been repeatedly held by the courts of different States, that the requirement of a license in order to authorize such sales did not extend to officers making sales under the processes of the court. 77 Mich. 483; 33 N.H. 441; Black on Intoxicating Liquors, Sec. 139. In the application of the principle involved, the courts have gone further and held that by an assignment in insolvency the debtor's liquor passes like other property; that while an administrator would not be authorized to carry on the business of his decedent under the latter's license, yet if in the process of his duty he was reducing the assets of the estate to cash and sold the stock of liquor at a public sale or otherwise in large quantities, either for money or in composition of the debts of the estate, such a sale would not be one contemplated by the license law. 17 Wis. 463. * * *
- "3. From what has been said above, it must follow as our conclusion, that a lawful sale of liquors seized under execution can be made by an officer in executing the process of the court, and that such sale is not repugnant to the provisions of the act of 1885, and that a sale so made is not of itself a public nuisance, nor will it be enjoined on that ground in any county of this State."

See also Wildermuth v. Cole, 77 Mich. 483, wherein the court said:

"The contention of counsel for the plaintiff is that the sheriff could not legally levy upon and sell intoxicating liquors under attachment and execution. It is not claimed that the liquors levied upon were exempt under any statute of this State, but that, inasmuch as the sheriff had not paid the tax and filed the bond required by the liquor law from all persons selling intoxicating liquors, the levy and sale is void.

"Section 1 of the Liquor Law of 1887 requires all persons engaged in the business of manufacturing, selling, or keeping for sale intoxicating liquors to pay the tax on the business. Section 8 provides that all such persons shall give a bond before commencing such business, etc.

"The sheriff, in making sales of these liquors under his execution, was not, within either the letter or spirit of this statute, engaged in the business of selling intoxicating liquors. Under the conceded facts, the plaintiff was legally liable for the amount named in the execution; and there is no more reason why his property should not be sold to satisfy it than the property of another, which consists of horses or other chattels. The learned circuit judge was correct in directing the verdict for the defendant."

There is no statute in this state exempting intoxicating liquor from executions to satisfy judgments for debts.

CONCLUSION

Therefore in view of the foregoing authorities and decisions and in the absence of any specific statutory inhibition against the sale of intoxicating liquors under an execution, it is the opinion of this department that in this instance the sheriff may levy and sell the stock of liquors to satisfy the execution.

Respectfully submitted,

AUBREY R. HAMMETT, JR. Assistant Attorney General

APPROVED:

J. E. TAYLOR ATTORNEY GENERAL -OPERATIVE: Co-operative organized under laws of CORPORATIONS: District of Columbia may qualify to do business in Missouri.

May 23, 1949

1/49

Hon. Walter H. Toberman Secretary of State Jefferson City, Missouri

> Attention: Mr. W. Randall Smart Corporation Supervisor

FILED 89

Dear Sir:

We have received your request for an opinion of this department, which request is as follows:

"We are in receipt of a letter dated March 11, 1949, copy of which is attached hereto, from Jerome A. Gross, Attorney at Law, St. Louis, Missouri, relative to the qualifying of the Cooperative Services of St. Louis, Inc. Said letter is in answer to our request that this corporation furnish us a more detailed report as to the kind of cooperative and business purposes.

"The cooperative association, incorporated in the District of Columbia desires to qualify in this state as a nonprofit cooperative with capital stock, having a par value of \$25.00 per share. We find no provision in our laws whereby we can permit the qualifying of a foreign nonprofit cooperative stock company. Section 14355 R. S. of Mo., 1939, provides for the qualifying of any association organized under generally similar laws of another state. This section is in the law covering nonprofit cooperative associations. We note all citations mentioned in the enclosed letter refer to sections in the stock cooperative laws and we do not believe same are applicable here.

"The questions in which we are concerned are:

First, are the Missouri laws and the laws of the District of Columbia, under which this association was formed, similar? We think they are not similar to the State of Missouri nonprofit cooperative laws for the following reasons:

Missouri law requires a majority of incorporators to be engaged in the production
of agricultural products, (Section 14335
Nonprofit Act), whereas, District of Columbia
laws require only 'any five or more natural
persons.' (Article II, Section 2.) Missouri
law requires business purposes to be specific
and limited (Section 14335). The laws of the
District of Columbia in this respect are general and permit the operation of any kind of
business or services for the primary and mutual benefit of the partners of the association (Article II, Section 3).

Second, our question is this, can this department accept for filing application for a certificate of authority to transact business in this state by a foreign nonprofit stock cooperative organized under the laws of the District of Columbia, laws relating to cooperative associations?

"Although the attorney for the applicant corporation refers extensively to the sections of the Missouri Cooperative Law relative to stock companies, we do not believe Article 28 relating to stock cooperatives is applicable here as the applicant corporation definitely states it is a nonprofit cooperative, and being a nonprofit, could not qualify as a business cooperative or stock corporation. Further, no provision is made in the stock cooperative act (Article 28) to qualify a similar cooperative of another state."

The laws of this state provide for the formation of cooperative corporations and associations. Article 23 of Chapter 102, R. S. Mo. 1939 (Secs. 14334 to 14363), provides for the formation of nonprofit co-operative associations. These are the so-called nonstock co-operatives, such organizations not being authorized to issue shares. Section 14335 prescribes the purposes for which such associations may be formed, as follows:

> "Eleven (11) or more persons, a majority of whom are residents of this state, engaged in the production of agricultural products, may form a non-profit co-operative association, without capital stock, under the provisions of this article, for the following purpose or purposes: To engage in any activity in connection with the marketing or selling of the agricultural products of its members or with the harvesting, preserving, drying, processing, canning, packing, grading, storing, handling, shipping or utilization thereof or the manufacturing or marketing of the by-products thereof; or in connection with the manufacturing, selling or supplying to its members of machinery, equipment or supplies; or in the financing of the above enumerated activities; or in any one or more of the activities specified herein."

Section 14355 provides:

"Any association heretofore or hereafter organized under generally similar laws of another state shall be allowed to carry on any proper activities, operations and functions in this state upon compliance with the general regulations applicable to foreign corporations desiring to do business in this state and all contracts which could be made by any association incorporated hereunder, made by or with such associations shall be legal and valid and enforceable in this state with all of the remedies set forth in this articles."

Article 28, Chapter 102, R. S. Mo. 1939 (Secs. 14406 to 14424), provides for the formation of co-operative companies. Companies formed under such article are authorized to issue capital stock shares. Section 14406 prescribes the purposes for which such companies may be formed, as follows:

"Any number of persons, not less than twelve (12), may associate themselves together as a co-operative association, society or exchange, having all the incidents, powers and privileges of corporations, for the purpose of conducting any agricultural or mercantile business on the co-operative plan, including the buying, selling, manufacturing, storage, transportation or other handling or dealing in or with by associations or agriculturists, of agricultural, dairy or similar products, and including the manufacturing transformation of such articles into products derived therefrom, and for the purpose of the purchasing of or selling to all shareholders and others groceries, provisions and all other articles of merchandise. For the purposes of this section the words 'association,' 'company,' 'corporation,' 'society' or 'exchange' shall be construed to mean the same.

No mention is made in Article 28 concerning the admission to do business in this state of companies organized under similar laws of other states.

The company which seeks to do business in this state is organized under the "District of Columbia Cooperative Association Act." Pub., No. 642, 76th Cong., 3d Session, Ch. 397; 54 Stat. 480. Section 2 of the act authorizes any five or more natural persons or two or more associations to incorporate in the District of Columbia under the act. Section 3 provides:

"An association may be incorporated under this act to engage in any one or more lawful mode or modes of acquiring, producing, building, operating, manufacturing, furnishing, exchanging, or distributing any type or types of property, commodities goods, or services for the primary and mutual benefit of the patrons of the association (or their patrons, if any) as ultimate consumers. (Underscoring ours.)

Under Section 5 of the act an association organized thereunder may or may not have capital stock, according to the wishes of the incorporators. The general scheme for the operation of a company organized under the District of Columbia Act is on the co-operative plan generally similar to that provided for the operation of co-operative companies organized under the Missouri laws, above referred to.

Under the general principles of comity there would appear to be no objection to a company organized under the District of Columbia laws entering this state and carrying on its business here. The principle is set out in 23 Am. Jur., Foreign Corporations, Section 62, page 72, as follows:

"In the absence of special legislation, a foreign corporation is generally at liberty, under the rule of comity, to enter a state for the purposes of its business on the same footing as a domestic corporation, there to exercise all the powers it is authorized to exercise at home and to do any act, within the scope of its limited powers, which is not prohibited by the local state, subject to no other conditions than that it will conform to the public policy of the state as declared in her general law and the decisions of her courts. * * *

The rule is further set out in Section 73 of that work, at page 80:

"As a general rule, in the absence of a positive statutory prohibition, the comity by which a corporation is permitted to transact its business in the state is not withdrawn by implication from the omission by the legislature to provide for the formation of similar domestic corporations or to authorize such a business to be carried on by its own corporations. Neither does such a result follow from the fact that the foreign corporation is created in a manner different from that permitted by local law. The rule of comity

does not insist on complete similarity
between foreign and domestic corporations
in order to admit the former, but takes
cognizance of the differences which exist
and as a policy of the state admits them,
accommodating itself to such as are not
obnoxious to its own determined policies.
* * * (Underscoring ours.)

Those principles were applied by the Kansas City Court of Appeals in the case of Mutual Orange Distributors v. Black, et al., 287 S.W. 846.

In view of these principles, there would appear to be no justification for an unnecessarily strict interpretation of Section 14355, R. S. Mo. 1939, above quoted, which provides for the admission to the state of companies organized under the co-operative plan under generally similar laws of other states. Certainly, their doing business on the co-operative plan is not contrary to the policy of this state inasmuch as it is expressly provided for the formation of such companies under its laws. Therefore, such differences as the presence of capital stock shares or the absence thereof would not seem to be particularly significant. If the general scheme of operation is on the co-operative basis, and there is no question that the companies organized under the District of Columbia Act do not operate on the co-operative basis, there would seem to be no reason for precluding their admission to do business in Missouri.

Conclusion.

Therefore, it is the opinion of this department that the laws of Missouri and the laws of the District of Columbia providing for the formation of co-operative corporations are generally similar within the meaning of Section 14355, R. S. Mo. 1939, and that a corporation organized under the District of Columbia Co-operative Act should be permitted, under Section 14355, to qualify and carry on its business in Missouri.

Respectfully submitted,

APPROVED:

ROBERT R. WELBORN Assistant Attorney General

J. E. TAYLOR Attorney General

RRW:ml

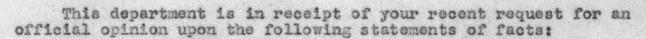
DELINQUENT TAX SALES:

In order to get a collector's deed the holder of a collector's tax sales certificate of purchase must obtain from the collector and record, such deed within four years of the time of said sale of such realty.

June 22, 1949

Mr. Bryan Tout County Audit Supervisor Office of the State Auditor Capitol Building Jefferson City, Missouri

Dear Sir:



"A tax sale certificate of purchase representing the delinquent taxes for the years 1933, 1934, 1935, 1936 and 1937 was issued November 10, 1938, under the provisions of Section 11,133 R. S. Mo. 1939.

"A request was made by letter to the County Collector for a deed within the period provided by Section 11,137, R. S. Mo. 1939. Evidently the letter was misplaced, as the deed was not issued. The Collector to whom the letter was directed is now deceased. All taxes accruing since the issuance of the tax certificate, have been paid by the purchaser of the tax certificate.

"The question is, would the present county collector be authorized to issue a collector's deed upon presentation of the tax certificate. If not, is there any other method whereby the holder of the tax certificate could obtain title to the property represented in said certificate."

Article IX, page 255, Mo. R.S.A. Vol. 22, sets forth the law and procedure to be followed in instances where taxes on land become delinquent. This article includes a statement of what lands may be sold for failure of the owner to pay taxes, and the method of sale. Since no issue has been raised, in the case which you present to us, of irregularities in these proceedings, we see no need to discuss them here, but assume that they were regularly complied with.

Section 11132, Mo. R.S.A. 1939, states, in part, that:

"Where such sale is made, the purchaser at such sale shall immediately pay the amount of his bid to the collector, * * * * * *

This was done in the instant case.

Section 11133, Mo. R. S. A. 1939, states, in part, that:

"After payment shall have been made the county collector shall give the purchaser a certificate in writing, to be designated as a certificate of purchase, which shall carry a numerical number and which shall describe the land so purchased, each tract or lot separately stated, the total amount of the tax, with penalty, interest and costs, and the year or years of delinquency for which said lands or lots were sold, separately stated, and the aggregate of all such taxes, penalty, interest and costs, and the sum bid on each tract. * * *"

This also was done.

Section 11136, Mo. R. S. A. 1939, states, in part, that:

"Any purchaser at delinquent tax sale of any tract or lot of land, his heirs or assigns, who takes possession of any tract or lot of land within the redemption period shall be required to pay the taxes subsequently assessed on such tract or lot of land during the period of occupancy and within the redemption period * * * * * * * *

This too was done by the purchaser.

Section 11137, Mo. R. S. A. 1939, states:

"In all cases where lands have been or may hereafter be sold for delinquent taxes, penalty, interest and costs and a certificate of purchase has been or may hereafter be issued it is hereby made the duty of such purchaser, his heirs or assigns, to cause a deed to be executed and placed on record in the proper county within four years from the date of said sale: Provided, that on failure of said purchaser, his heirs or assigns so to do, then and in that case the amount due such purchaser

shall cease to be a lien on said lands so purchased as herein provided. * * * * *

This the purchaser did not do.

The question, therefore, which is now before us is, what effect did the failure of the purchaser to obtain from the collector, and record, a deed to the land purchased at the collector's sale within four years of the date of said sale?

In the case of Bullock v. Peoples Bank of Holcomb, 173 S. W.(2d) 753, a 1943 case, the court, in discussing the effect of this failure on the part of the purchaser, said: (1.c. 760)

"The tax deed was not recorded within four years from the date of the tax sale, as required by Sec. 11137, but one day too late. That sale was on November 12, 1935. The four years ended on Saturday, November 11, 1939, which was Armistice Day. It and the next day, Sunday, were both public holidays. Sec. 15310. Defendant cites Sec. 655, clause 4, providing that when the last day within which an act shall be done falls on Sunday, it shall be excluded. But the section does not so provide with respect to Armistice Day. The deed should have been recorded on or before that day, and since it was not, defendant's lien or title rights thereunder expired, as Sec. 11137 provides and the plaintiff contends. The fact that a day is made a holiday by statute does not mean business cannot be transacted on that day, except insofar as that statute or some other imposes such restriction. Cartwright v. Liberty Tel. Co., 205 Mo. 126, 131(1), 103 S.W. 982, 983(1), 12 L.R.A., N.S., 1125, 12 Ann Cas. 249; Stewart V. Brown, 112 Mo. 171, 182, 20 S.W. 451, 453(3); State v. Green, 66 Mo. 631, 644 (3); In re Green, 86 Mo. App. 216, 223." (Underscoring ours.)

This decision is sustained in the 1944 case of State ex rel. Baumann, Collector, v. Marburger, 182 S.W.(2d) 163, in which the court stated: (1.c. 165 & 166)

"Under our Jones-Munger Act, the holder of a certificate of purchase, throughout the two years immedi-

ately succeeding the tax sale, is vested with an inchoate or inceptive interest in the land subject to the absolute right of redemption in the record owner in whom the title remains vested. After the two year period of absolute right of redemption, and for a further two year period, the certificate holder has an equitable title in the property with the right to call in the legal title by producing the certificate of purchase, paying certain taxes and fees, and demanding a deed. Bullock v. Peoples Bank of Holcomb, 351 Mo. 587, 173 S.W.(2d) 753; Hobson v. Elmer, 349 Mo. 1131, 163 S.W.(2d) 1020; State ex rel. City of St. Louis v. Baumann, 348 Mo. 164, 153 S.W.(2d) 31. The record owner continues the owner of the legal title and has the right of redemption which he, or any other persons having an interest in the land, may exercise by application therefor and by making certain required payments at a time within four years immediately succeeding the tax sale and prior to the exercise, after the lapse of the two years immediately succeeding the sale, of the right of the certificate holder to have the legal title transferred to him. Section 9956a, Laws of Missouri 1933, p. 437, Mo. R.S.A. Sec. 11145; Hobson v. Elmer, supra. The legal title does not vest in the holder of the certificate of purchase by virtue of the tax sale until the sale is consummated, that is, until (there being no redemption) the holder shall have exercised his right to have the legal title transferred to him." (Underscoring ours.)

The court has not, subsequent to the above cited case, dealt with this issue, and so we may take this latest pronouncement to be the law in Missouri upon this particular point.

In this connection we would call your further attention to Section 6354, Mo. R.S.A. 1939, which states:

"Unless the holder or owners of certificates of purchase of real estate purchased at any tax sale under this article take out the deed or deeds, as permitted or contemplated by this article, and have such deeds recorded within

two years from and after the time for redemption expires, the said certificates or deeds, and the sales on which they are based, shall, from and after the expiration of such two years, be asolutely null, and shall constitute no basis of title, and shall cease to be a cloud on the title of the real estate to which such certificates refer."

This section applies to the sale of land for delinquent taxes in cities of the first class. While not, therefore, directly applicable to your situation we do believe that it indicates the intention of the Legislature in general in regard to the effect of failure to get and record a deed within the four year period, and that by indirection it thus clarifies the meaning of Section 11137, supra, quoted above.

In view of the above it is the opinion of this department that failure on the part of the purchaser to get and record a deed within four years of purchase at collector's sale divests him of all "lien or title rights" which he acquired by virtue of the collector's certificate of sale, and by his payment of subsequent tax assessments.

In the instant case, however, there is an additional element which we should examine to see what effect, if any, it may have upon the failure of the purchaser to receive and record a title within the four year period as required by Section 11137, supra. This element is stated thus in the letter of inquiry: "A request was made by letter to the county collector for a deed within the period provided by Section 11137, R. S. Mo. 1939." In regard to this evidently either one or the other of two things occurred: the letter mailed to the collector was not received by him; or it was received and was not acted upon. The question here is whether the sending of a letter requesting a deed, within the four year period, relieved the purchaser from compliance with Section 11137, supra. We think not,

In the case of Hobson v. Elmer, 163 S.W.(2d) 1020, the court states: (1.c. 1023)

"We must, however, also take into consideration the language of Section 11149, R. S. Mo. 1939 Mo. R.S.A. Sec. 11149): 'If no person shall redeem the lands sold for taxes within two years from the sale, at the expiration thereof, * * * the collector of the county in which the sale of such lands took place shall execute to the purchaser * * * a conveyance of the real estate so sold, which shall vest in the grantee an absolute estate in fee simple.

"There is one manner and, in our opinion, only one manner in which these seemingly conflicting provisions may be harmonized. We construe them to mean that the owner of the lands has an absolute power of redemption which cannot be defeated by the purchaser during and up to the end of the two-year period. Thereafter the purchaser has a right to obtain a collector's deed at any time within the next two years by complying with the various statutory provisions, to-wit: by producing to the collector his certificate of purchase, paying the subsequently accrued taxes and legal fees and demanding his deed. If, after the end of the two-year period and before the purchaser has complied with these conditions precedent to obtaining his deed, the owner or transferee applies for a redemption and makes the required payments he thereby destroys the power of the purchaser to obtain a deed.

"The foregoing discussion brings us to the consideration of the second question here involved which is: Did the defendant Elmer perform everything that he was required to perform in order to be clearly entitled to a collector's deed before the alleged redemption was made? Obviously if a certificate holder has actually tendered to the collector his certificates, together with the amounts due thereunder, his right to a deed cannot be defeated simply because the collector has refused or failed to execute and deliver the deed. An attempted redemption at such time would be unavaling." (Underscoring ours.)

It will be observed from the foregoing that if a purchaser actually tenders his certificate of purchase to the collector, within the four year period, the failure or refusal of the collector to give the deed will not permit the original owner, or anyone else, to redeem subsequent to such tender by the purchaser. That, however, is not the same set of facts that we have here. In the instant case no actual tender was made because the collector's certificate of sale was not presented to him and indeed it is not certain that the matter was ever called to his attention in view of the fact that it is not certain that he ever received the letter requesting the deed. Furthermore, if it should be held that the mere writing of a letter be construed to be a tender, it was not done within the four year period. It is therefore the opinion of this department that the writing of the letter aforesaid did not take the instant case out of the explicit provisions laid

down by Section 11137, supra, and that that section applies in full in the instant case. That being so, in view of the language of the above section, and the only extant constructions of it by the Supreme Court of Missouri, it is the conclusion of this department that the purchaser, by reason of his failure to comply with the provisions of Section 11137, supra, no longer possesses any lien or title rights, and that therefore the county collector of the county in which this sale of land was made is not authorized to issue a collector's deed upon presentation to him of the tax certificate by the holder thereof.

Your second question is: "If the present county collector is not authorized to issue collector's deed upon presentation of the tax certificate, is there any other method whereby the holder of the tax certificate could obtain title to the property represented in said certificate?

This question obviously is one which concerns the course of action which may be pursued by a private individual and has no connection whatever with the discharge of the duties of any state or county officer. In this connection therefore we would call your attention to Section 12899, R. S. Mo. 1939, which states:

"When required, he shall give his opinion, in writing, without fee, to the general assembly, or to either house, and to the governor, secretary of state, auditor, treasurer, superintendent of public schools, warehouse commissioner, superintendent of insurance, the state finance commissioner, and the head of any state department, or any circuit or prosecuting attorney upon any question of law relative to their respective offices or the discharge of their duties."

From the above it must be plain that it is beyond the province of this department to render an official opinion upon the rights or possible course of action of a private individual such as is the purchaser in the instant case. If he wishes to take action in this matter it is incumbent upon him to obtain a private attorney for this purpose. For these reasons therefore this department does not give a legal opinion in answer to your second question. We would, however, unofficially, indicate that there are remedies in equity which we believe to be available to this purchaser to extricate him from the situation in which he is placed.

CONCLUSION

It is the conclusion of this department that failure on the part

Mr. Bryan Tout

of the purchaser to get and record a deed, within four years of the purchase of real estate at the collector's sale, divests him of all lien or title rights which he acquired by virtue of the collector's certificate of sale, and by his payment of subsequent tax assessments, and that, therefore, the county collector of the county in which this sale of land was made is not now authorized to issue a collector's deed upon presentation to him of the tax certificate by the holder thereof.

Respectfully submitted,

. . . .

HUGH P. WILLIAMSON Assistant Attorney General

APPROVED:

J. E. TAYLOR Attorney General

HPW:mw

DOCUMENTARY EVIDENCE OF)
MARRIAGE CONTRACTED IN)
ARKANSAS OFFERED IN CIRCUIT COURT IN THE)
STATE OF MISSOURI:)

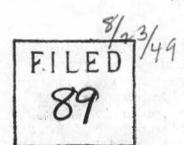
A certified copy of the record of a marriage contracted in the State of Arkansas is admissible in the circuit court, State of Missouri, if it is attested by the seal of office of the county official in Arkansas known as clerk and recorder.

August 16th 1949

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Honorable B. C. Tomlinson Prosecuting Attorney St. Francois County Farmington, Missouri

Dear Sir:



We have your letter of June 21, 1949, in which you request an opinion of this department, your letter is as follows:

"I would like an opinion from your office in answer to the following situation:

"In a bigamy prosecution where the second marriage took place in Arkansas, can a certified copy of the Arkansas record of the marriage be introduced in evidence? If so, please outline the manner in which the record must be certified and authenticated and how the proof of the second marriage should be made by this record."

The first question is whether or not a certified copy of an Arkansas marriage record is admissible in the circuit court of Missouri when relevant for the purpose of proving bigamy in a bigamy prosecution, and the second question is whether or not assuming that a certified copy of such record from another state is admissible in the circuit court of Missouri, how must it be certified, or authenticated to render it admissible.

We have examined both the Missouri Statutes and the Statutes of the State of Arkansas relative to documentary evidence, and we find that the law of both Missouri and Arkansas provides that certified copies of marriage records shall be admissible in evidence in courts of record to show or prove the marriage in cases in which the proof of marriage is relevant to the issues before the court. Such provision of the Missouri law is to be found in Section 1869 R.S.A. Mo. 1939, and reads as follows:

"The record books of marriages to be kept by the respective recorders, in pursuance of the provisions of law, and copies thereof certified by the recorder under his official seal, shall be evidence in all courts."

This statute is, of course, not in and of itself sufficient to render certified copies of the marriage records of other states admissible in evidence in Missouri courts, but taken in connection with similar statutory provisions in the State of Arkansas, which provisions we shall hereinafter set forth, and with the common law upon the subject, which we shall hereinafter undertake to set forth, we are of the opinion that said Missouri Statute above quoted, does have a signifigance in worthy of consideration in the process of arriving at a conclusion and an answer to the question propounded. We shall now refer to the Walter L. Pope compilation of the Statutes of Arkansas for 1937, and to certain specific sections of the Arkansas law set forth in said compilation. Section 5143, Vol. I, of said compilation of the Arkansas Statutes is as follows:

"Papers on File in Public Offices"

"Copies of any record, book, report, paper or other document on file with, or of record in the office of any public officer or commissions of the state, or of any county officer, or any excerps from said record, book, report, paper or other documents, when duly certified by the officer or secretary of the commission in whose custody such record, book, paper or other document is found, shall be received in evidence in any court of this state with like effect as the originals thereof."

Section 11208 of said compilation of the Arkansas Statutes is as follows:

"There shall be established in each county in this state an office, to be styled the recorder's office, it shall be kept at the Seat of Justice."

Section 11209 of said compilation of the Arkansas Statutes

is as follows:

Circuit Clerk to be Recorder.

"The clerk of the Circuit Court shall be ex-officio recorder for his county and shall duly attend to the duties of such office, and shall provide and keep in his office well-bound books, in which he shall record in a fair and legible hand, all instruments of writing authorized or required to be recorded in the manner hereinafter provided."

Section 11214 of said compilation of the Arkansas Statutes is as follows:

"The seal of the circuit court shall be the seal of the recorder and shall be used as such in all cases in which his official seal may be required."

Section 9049 of said compilation of the Arkansas Statutes reads as follows:

"Upon the return of any license officially signed as having been executed and that the parties therein named have been duly and according to law joined in marriage, the clerk issuing the same shall make a record thereof in the marriage records of his office; and he shall immediately make out a certificate of such record giving names, date, book and page, together with the names of county and state and attach such certificate to the license and return the same to the party presenting it. Said certificate shall be signed officially by the clerk and sealed with the County Seal."

We comment that from the Arkansas Statutes last above quoted, it is apparent that the law of Arkansas provides that certified copies of public records kept pursuant to the provisions of the law by county officials whose duty it is to keep

such records are admissible in evidence in the courts of Arkansas, and it is apparent that the law of that State establishes the office of recorder, and makes the clerk of the circuit court ex-officio recorder, and it is further apparent that the Arkansas law imposes upon said recorder the duty to make a record of all marriages contracted, said records to be made when a return of the marriage license has been presented, and it is further apparent that the law of Arkansas provides that the circuit court shall have an official seal which shall be the official seal of the clerk of the circuit court when acting in his capacity as ex-officiol recorder. It is further apparent that the law of Arkansas provides that marriage records duly certified shall be admissible in the courts.

We are of the opinion that the existence of these provisions of the Arkansas law warrants the conclusion that marriage records of the circuit clerk and recorder properly certified are admissible in the courts of that state, and we believe that said statutes above quoted warrant the opinion that when the certificate of said recorder certifies the document to be a true and correct copy of said marriage record, and when said certificate is attested by the seal of the recorder, said copy is duly certified and is admissible in the courts of the State of Arkansas.

We believe, therefore, that we have thus far demonstrated that marriage records of marriages contracted in the State of Missouri duly certified by the recorder are admissible in evidence in the Missouri courts, and that marriage records as to marriages contracted in the State of Arkansas when duly certified by the recorder are admissible in the Arkansas court, and that such marriage records in the State of Arkansas may be attested by the official seal of the recorder in that State. These facts, however, do not establish the proposition that duly certified marriage records of the State of Arkansas are admissible in evidence in the State of Missouri.

In order to determine whether or not such records of Arkansas marriages are admissible in the State of Missouri, we have endeavored to arrive at the common law involved in the question. In this connection we wish to quote as follows from Greenleaf on Evidence under the heading "Official Register":

Section 483, Greenleaf on Evidence Vol. I, Page 630.

"The next class of public writing to be considered consists of official registers, or books kept by persons in public office, in which they are required by statute or by the nature of their office, to write down particular transactions, occuring in the course of their public duties, and under their personal observation. documents, as well as others of public nature, are generally admissible in evidence, notwithstanding their authenticity is not confirmed by those usual and ordinary tests of truth, the obligation of an oath, and the power of cross examining the persons on whose authority the document depends. The extraordinary degree of confidence it has been remarked, which is reposed in such documents is founded principally upon the circumstance that they have been made by authorized and accredited agents appointed for the purpose; but partly also on the publicity of their subject-matter. the particular facts are inquired into and recorded for the benefit of the public, those who are empowered to act in making such investigation and memorials are in fact the agents of all the individuals who compose the state; and every member of the community may be supposed to be privy to the investigation. On the ground therefore, of the credit due to agents so empowered and of the public nature of the facts themselves, and such documents are entitled to an extraordinary degree of confidence; and it is not necessary that they should be confirmed and sanctioned by the ordinary tests of truth. Besides this, it would be always difficult, and often impossible to prove facts of a public nature by means of actual witnesses upon oath".

Section 484:

"These books, therefore, are recognized by

law because they are required by law to be kept, because the entries in them are of public interest and notariety, and because they are made under the sanction of an oath of office, or at least under that of official duty. They belong to a particular custody, from which they are not usually taken but by special authority, granted only in cases where inspection of the book itself is necessary, for the purpose of identifying the book or the handwriting, or of determining some question arising upon the original entry; or of correcting an error which has been duly ascertained. Books of this public nature, being themselves evidence when produced, their contents may be proved by an immediate copy duly verified. Of this description are " "; the registers of births and marriages made pursuant to the Statutes of any of the United States; * * In short, the rule may be considered as settled that every document of a public nature, which there would be inconvenience in removing, and which the party has the right to inspect may be proved by duly authenticated copy. " (Underscoring ours).

In view of the reasoning embodied in the above rather extensive quotation from Greenleaf on Evidence, we are of the opinion it is well established that the marriage and birth records of any state in the Union when duly certified are admissible in the courts of record of any sister state.

We are, therefore, of the opinion that the record of the marriage in Arkansas to which you refer when duly certified will be admissible in a trial for bigamy in the circuit court in the State of Missouri.

This then leaves the second question for consideration, and that is what constitutes sufficient certification or authentication of the record. In this connection we point out that where an official has a seal of office, his certificate reciting his official capacity and reciting the fact that the law of his

state authorizes him and imposes on him the duty of keeping such records, and reciting the fact that the copy being certified is a true and correct copy of such record, is a proper certificate when attested by his official seal, and constitutes due certification of the instruments offered in evidence, and should be admitted in evidence. In support of the proposition that attestation by the official seal of the certifying officer constitutes the necessary authentication, we desire to quote the following appearing under footnote 2, on page 627 of Volume I, of Greenleaf on Evidence, and particularly Section 3, under said footnote which reads as follows:

"The genuineness of an official document i.e. the fact that it was executed by the officer purporting to execute it would ordinarily have to be proved as the genuineness of any other document is; but in many cases where the seal is appended the genuineness is assumed. The seal is in such cases usually said to be judicially noticed; but the case seems rather to be one of real presumption, or of the presence of a purporting official seal being treated as sufficient evidence of genuineness. - * * * Thus, if a paper purporting to be a certified copy of an official marriage register is offered it must first be asked why the original is not produced; this objection being satisfied, the question then arises whether the register itself is receivable under the hearsay exception as testimony to the facts recorded in it, and again whether under the same exception the certified copy is receivable to show the register's contents; finally, the genuineness of the certified copy must somehow be indicated."

It is clear that the author here means that the prevailing doctrine is that the genuineness of the certified copy is established by its attestation by the official seal of the officer.

We further desire to call your attention to the case

of State vs. Shreve, 137 Mo. 1, 1.c. 6. This is a case of prosecution for bigamy in which a certified copy of the record of the probate court at Leavenworth, Kansas, of the marriage of the defendant was admitted in evidence by the circuit court in the State of Missouri. It was pointed out by the Supreme Court in its opinion, that the laws of both Missouri and Kansas made certified copies of the record of marriages competent evidence, and it held that the objection to the admission of the Kansas marriage record was without merit. The following is a quotation from the opinion:

"Error is also predicated upon the admission in evidence of the certified copy of the record of the probate court of Leavenworth County, Kansas.

"This objection is utterly without merit. The laws of Kansas which provided for a license to marry; which authorized the probate judge to perform the marriage ceremony; which provided for the return of the license to the probate judge; which provided for recording the license and return thereon; and which made certified copies of the record thereof evidence in all courts, were in evidence. These laws are in harmony with our own and the same credit is due here to the action of the judge thus duly certified as would have been accorded to the same in Kansas. The objection was properly overruled."

CONCLUSION.

We are, therefore, of the opinion that if you obtain a certificate of the proper officer of the State of Arkansas, namely, the recorder, who is also the circuit clerk, attested by his seal of office to the effect that the marriage record,

a copy of which he is certifying, is a true and correct copy of the record in his office and reciting further that he is such recorder duly elected, or appointed and qualified under the law of the State of Arkansas, and that it is his duty under the law to keep records of marriages and record same, and if you offer such certified copy in evidence, and if you also offer in evidence therewith either the printed statutes of the State of Arkansas with the particular sections thereof designated which pertain to issuance of licenses to marry return of marriage licenses after marriage, recordation of marriage by the recorder and establishment of the office of recorder and also pertaining to the duty of the recorder to keep records of marriages, namely, Sections 11208, 11209 and 9049 of the Walter L. Pope Compilation of the Statutes of Arkansas, 1937 edition above cited, or if printed volumes of such statutes are not conveniently available, then copies of said sections certified by the Secretary of State of either Arkansas or Missouri to be correct copies of said sections of the Arkansas law, said officer's certificate so certifying said section setting forth in full the title and page of such printed copies of said sections in accordance with the provisions of section 1814 R.S. Mo. 1939, then both your certified copy of marriage record, and your copies of said Arkansas laws will be admissible in evidence in the Circuit Court of the State of Missouri for the purpose of proving the purported second marriage of defendant.

Respectfully submitted,

APPROVED:

SAMUEL M. WATSON Assistant Attorney General

J. E. TAYLOR ATTORNEY GENERAL SMW:p PATENTS:

Patent to certain real estate should be SECRETARY OF STATE: issued by Governor and countersigned by

Secretary of State.

September 17, 1949

Honorable Walter H. Toberman Secretary of State State of Missouri Jefferson City, Missouri

Dear Sir:

This is in answer to your letter of recent date requesting an official opinion of this department, reading as follows:

> "We are enclosing herewith copies of communications regarding a supposedly lost swamp land patent and copy of a court order issued by the St. Clair County Court.

"We have no record of the issuance of this patent covering the Northwest quarter of the Northeast quarter, Section 33, Township 37, Range 26. We do, however, have a receipt from the County Clerk's office issued April 15, 1857 showing that U. L. Sutherland purchased said section of land. The court order states that Sutherland purchased this land on January 25, 1858. It appears to us that Mr. Sutherland did purchase this section in 1857 or 1858.

"The court order states, 'It is therefore ordered that a patent be authorized to be issued by the State of Missouri to said U. L. Sutherland.'

"There is a question as to how this may be accomplished. We cannot issue a duplicate of the original as the original is not on record in this office. Since the date of said purchase, the swamp lands have been donated to the counties and the patents are issued by the presiding judge of the County Court. (See Sections 12752 and Section 12755, R. S. Mo., 1939.)"

The title of swamp lands, insofar as St. Clair County is concerned, was given to said county by Section 1, Laws of Missouri, 1850-51, page 238. This grant was confirmed by subsequent enactments confirming to the various counties the title to swamp lands located therein. Section 4, Laws of Missouri, 1850-51, page 238, provided for the patent to swamp land to be signed by the Governor and countersigned by the Secretary of State. Laws of Missouri, 1869, page 66, provides for the patenting to the various counties of all swamp land located therein except that swamp land patented by the State of Missouri to individuals prior to the passage of such act. Section 6 of such act provided that the county should issue a patent to individuals for the swamp land so conveyed by the state to the county and sold by the county to individuals.

The real property involved herein has never been patented by the state to an individual or to St. Clair County insofar as the records of the Secretary of State's Office are concerned. The only document with reference to this real property found in the Office of the Secretary of State is a receipt by the County Clerk of St. Clair County dated April 15, 1857. A copy of such receipt is hereto attached. While the act found Laws of Missouri, 1869, page 66, provided that after the passage of such act and the conveyance to the county by the state of the swamp lands, which had not been formerly patented, that patent should be issued by the county court, we believe that such act had reference only to the real property patented by the state to the county and did not refer to real property which had been purchased by an individual and which should have been patented by the Governor to such individual.

It is, therefore, our view that the evidence of the receipt of the County Clerk of St. Clair County of payment by U. L. Sutherland for the swamp land involved is sufficient authority for the Governor to issue the patent that should have been issued by the Governor when such receipt was received by the State of Missouri.

Section 1, of an act concerning the register of lands found in Laws of Missouri, 1857, page 33, provides as follows:

"That when a patent has issued, or shall be hereafter issued, by the Governor or Register of Lands of this State, to a person who is dead at the issuing of the patent, the heirs of such patentee shall take hold and enjoy the title to the estate so patented, in such portions as they are entitled to by the laws

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then in force regulating descents, as if such patent had issued to such heirs by name; Provided, that when such real estate may have been sold, devised, or otherwise transferred by such patentee, or by his heirs, or when it may have been conveyed or transferred by virtue of a judgment or decree of a court, the patent shall inure to the benefit of, and the title thereby conveyed shall vest, in the owner of such real estate at the date of issuing such patent."

Under the provisions of such law the patent to the real estate described in the opinion request should be issued to U. L. Sutherland and dated as of the time such patent is issued.

CONCLUSION

It is the opinion of this department that the Governor should issue a patent which should be countersigned by the Secretary of State conveying the real property described in the opinion request herein contained.

Respectfully submitted,

C. B. BURNS, JR. Assistant Attorney General

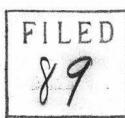
APPROVED:

J. E. TAYLOR Attorney General REFERENDUM:
BALLOT TITLE FOR HOUSE BILL NO. 185
October

October 26, 1949

10/26/49

Honorable Walter H. Toberman, Secretary of State, Capitol Building, Jefferson City, Missouri



Dear Sir:

We herewith submit ballot title for House Committee Substitute for House Bill No. 185 passed by the Sixty-fifth General Assembly:

"HOUSE COMMITTEE SUBSTITUTE FOR HOUSE BILL NO. 185 ENACTED BY SIXTY-FIFTH GENERAL ASSEMBLY OF MISSOURI:

"Provides increase in license tax from two cents per gallon to four cents per gallon on motor fuels, used or received for use, in propelling motor vehicles on public highways, for construction and maintenance of public highways, authorizes expenditure on state rural roads of net revenue from one cent per gallon of such tax apportioned among counties, one-fourth according to population, one-fourth according to area, one-half in discretion of State Highway Commission, areas and population of cities of more than 150,000 population not to be considered; all under supervision of said Commission, advised by bi-partisan committee concerning state rural roads."

Respectfully submitted,

CBB: AN

C. B. BURNS, JR., Assistant Attorney-General

APPROVED:

J. E. TAYLOR, ATTORNEY GENERAL REFERENDUM: SECRETARY OF STATE: Law to be voted on at referendum election to be published in newspapaers designated by the Secretary of State.

December 27, 1949

FILED 89

Honorable Walter H. Toberman Secretary of State Jefferson City, Missouri

Dear Sir:

This is in answer to your request for an official opinion of this department reading as follows:

"We respectfully request your opinion as to whether or not there is any provision in the State's laws for the publication of a referendum before an election and, if so, who has the responsibility to see that same is published?"

Section 53, Article 3 of the Constitution of Missouri, 1945, provides as follows:

"The total vote for governor at the general election last preceding the filing of any initiative or referendum petition shall be used to determine the number of legal voters necessary to sign the petition. In submitting the same to the people the secretary of state and all other officers shall be governed by general laws."

Section 2, Article 12 of the Constitution of Missouri, 1945, provides in part as follows:

" * * * If possible, each proposed amendment shall be published once a week for two consecutive weeks in two newspapers of different political

faith in each county, the last publication to be not more than thirty nor less than fifteen days next preceding the election. If there be but one newspaper in any county, publication for four consecutive weeks shall be made. * * * *

In the case of State ex rel. v. Westhues, 9 S.W. (2d) 612, the Supreme court of Missouri said at 1.c. 615:

" * * * The theory of the petition filed in the circuit court case (No. 5844 there) was that the secretary of state has no authority whatever to publish in a newspaper in each county in the state the full text of initiative measures proposing the enactment of a statute or of measures referred to the people under the referendum, and that the only authorized means for informing the voters of the nature of initiative and referendum measures as to proposed statutes is the ballot title provided for by section 5910, R. S. 1919."

The Circuit Court held at 1.c. 616:

"'The court is of the opinion that the secretary of state is not authorized under the law to designate the newspaper in each county to publish the initiative and referendum petitions which are not constitutional amendments.

"'Therefore proposition No. 2, which is an initiative petition, seeking to enact a law for the pensioning of police in certain cities, is not a law which the secretary of state is authorized to publish.

"'Therefore the injunction will be made permanent, restraining him from designating a newspaper in each county of the state and the city of St. Louis for the publication of the initiative petition.'"

The court further said at 1.c. 617:

"The initiative and referendum amendment to our state Constitution was adopted at the general election held November 3, 1908. It now appears as section 57, art. 4, of the Constitution. It is unnecessary to lengthen this opinion further by quoting the amendment in full. It provides for the enactment of laws by the people independent of the Legislative Assembly by a vote upon measures submitted to them by initiative petitions and for the rejection of laws enacted by the General Assembly by a vote of the people upon referendum petitions. It also provides for amendment of the Constitution by use of the initiative. The only part of the amendment which need be quoted here is the last sentence, reading as follows:

"'Petitions and orders for the initiative and for the referendum shall be filed with the secretary of state, and in submitting the same to the people he, and all other officers, shall be guided by the general laws and the act submitting this amendment, until legislation shall be especially provided therefor.'

"When the initiative and referendum amendment to the Constitution was submitted to the people, and when it was adopted, the only legislative proposals submissible to the people for approval or rejection were amendments to the Constitution proposed by the General Assembly. Hence the only general laws then in force governing submission of such proposals to the people were the constitutional provisions and statutes in respect to the submission of proposed constitutional amendments.

"Section 2, art. 15, of the Constitution, provides for its amendment by submission to and adoption by the people of proposals of the General Assembly. Said section provides that:

"'The proposed amendments shall be published with the laws of that session, and also shall

be published weekly in some newspaper, if such there be, within each county in the state, for four consecutive weeks next preceding the general election then next ensuing.'

"Clearly there must be a publication in each county of the full text of constitutional amendments.

"Under authority of section 2, art. 15, the General Assembly enacted what are now sections 4941 and 4942, R. S. 1919. The first portion of section 4941 is practically in the language we have quoted above from section 2, art. 15, of the Constitution. It provides in addition for the posting of copies of proposed constitutional amendments at each voting place upon the day of election for the information of voters. Section 4942 provides for designation by the secretary of state of the newspaper in each county in which the proposed constitutional amendments shall be published, and also provides the manner of paying for such publication.

"The foregoing constitutional and statutory provisions were the only general laws in force when the initiative and referendum amendment was adopted, which could have any bearing upon the question of whether or not initiative and referendum measures were required to be published in full in a newspaper in each county. As legislative proposals for amending the Constitution were then required to be published in a newspaper in each county, it seems clear that in submitting initiative and referendum measures the secretary of state was required, at that time at least, to make publication thereof in like manner.

"V. As section 57, art. 4, of the Constitution, authorizes legislation to provide for the submission of initiative and referendum proposals, it next becomes necessary to determine whether the General Assembly has undertaken to do away with the requirement of publication in full of such proposals in a newspaper in each county. Respondent so held.

Honorable Walter H. Toberman

"In 1909 the General Assembly enacted what is now chapter 47 of the 1919 statutes. That part of section 5910 of said chapter, which bears upon the manner of submitting initiative and referendum measures and which is relied upon by respondent as a full, proper, and exclusive legislative provision for submitting such measures, and as legislation 'especially provided therefor,' is as follows:

"'When any measures shall be filed with the secretary of state, to be referred to the people thereof by the referendum petition, and when any measure shall be proposed by the initiative petition, the secretary of state shall forthwith transmit to the Attorney General of the state a copy thereof, and within ten days thereafter the Attorney General shall provide and return to the secretary of state a ballot title for said measure. The ballot title may be distinct from the legislative title of the measure, and shall express, in not exceeding one hundred words, the purpose of the measure. The ballot title shall be printed with the number of the measure on the official ballot. In making such ballot title the Attorney General shall, to the best of his ability, give a true and impartial statement of the purpose of the measure, and in such language that the ballot title shall not be intentionally an argument likely to create prejudice either for or against the measure.'

"Manifestly, it would be impracticable to print upon the ballots used by the voters at the election the full text of lengthy initiative and referendum measures. The Workmen's Compensation Law, enacted by the Fifty-Third General Assembly and approved by the people as a referendum measure at the November, 1926, election, fills more than thirty pages as it is printed in the 1927 Session Acts. Laws 1929, pp. 490-522. The necessity for some ballot title for such measures, in order to give information of the character and purpose of the measure to those voters who have not read the full text and as a ready and accurate means of identifying the

particular proposal in the minds of those voters who have read the full text, would readily occur to the General Assembly. That is just what it seems to have undertaken to do by the language we have quoted from section 5910. It undertook to do nothing more than to provide for an official ballot title.

"The requirement of a ballot title is in no way inconsistent with and merely supplements the requirement that such proposed measures should be published in full in a The provision for newspaper in each county. a 'ballot title' does not relieve the secretary of state of the duty, in submitting initiative and referendum measures, to be guided by the general laws in force when the amendment was adopted. The requirement of publication was not rendered unnecessary nor made unlawful by an act of the General Assembly which, on its face, did not purport to make a different and certainly not an adequate provision for advising the voters of the nature and purpose of the proposed measure. Had the General Assembly provided that the voters should be advised of the nature of the proposal, for example, by posting a true copy thereof on the front door of the courthouse in each county or in some public place in each voting precinct, it might then reasonably be contended that the General Assembly had undertaken to provide for a manner of publishing such proposals different from that provided for publishing constitutional amendments proposed by the General Assembly. By merely requiring a ballot title, section 5910, R. S. 1919, purports to provide neither an especial nor an exclusive method of submission. If it did, such requirement would be of doubtful constitutional validity, to say the least, because the Legislature has no power to enact a provision in conflict with a constitutional provision or a requirement clearly implied therefrom. State ex rel. Elsas v. Workmen's Compensation Commission (Mo. Sup.) 2 S.W. (2d) 796, loc. cit. 801."

Honorable Walter H. Toberman

Since the holding in the Westhues' case was based on the provision that the submission of a referendum was to be governed by general laws and the constitution requires publication of proposed constitutional amendments, the reasoning in such case requires that a law to be referred must be published in the same manner as a proposed constitutional amendment.

Section 11678, R. S. Missouri, 1939, provides as follows:

"The secretary of state shall designate in what newspapaer in each county said proposed amendments shall be published, and the claim due the publisher of such newspaper for such publication and the costs of publishing the copies of the amendments hereinbefore provided for shall be certified by the secretary of state to the state auditor, who shall draw his warrant on the state treasurer therefor, payable out of any money in the treasury not otherwise appropriated."

Therefore, the Secretary of State designates the newspaper or newspapers in which the law, which is the subject of the referendum, is published. Section 11677, R. S. Missouri, 1939, provides as follows:

"All amendments proposed to the Constitution of the state of Missouri by the general assembly shall be published with the laws of the session at which they are proposed, and also in some newspaper, if such there be, in each county in the state for four consecutive weeks next preceding the general election then next ensuing, and two or more copies of such amendments, printed in great primer poster type, shall be posted at each voting place for the information of voters; such copies shall be furnished by the secretary of state to the county clerks of each county, who shall have the same duly posted at each voting place in his county on the morning of the election day on which said amendments are to be voted on."

Honorable Walter H. Toberman

The quoted provision of Section 2, Article 12 of the Constitution, supra, supersedes the provisions of Section 11677, R. S. Missouri, 1939, since the provision relating to publication in two newspapers is inconsistent with such statute. House Bill No. 2060 of the Sixty-fifth General Assembly repeals and reenacts Sections 11677 and 11678, R. S. Missouri, 1939, but such House Bill cannot become effective until ninety days after sine die adjournment of the General Assembly under provisions of Section 29 of Article 13 of the Constitution, and Senate Conncurrent Resolution No. 23, concurred in by the House, provides that sine die adjournment of the Legislature shall be on January 14, 1950. House Journal, Sixty-fifth General Assembly, page 2338. Therefore, such reenacted statutes will not be in effect before the special election to be held April 4, 1950.

CONCLUSION

It is the opinion of this Department that a law which is made the subject of a referendum election must be published in the same manner as proposed constitutional amendments are published; that such publication is governed by the provisions of Section 2, Article 12 of the Constitution of Missouri, 1945, and that the newspaper or newspapers in which publication is to be made are to be designated by the Secretary of State.

Respectfully submitted,

C. B. BURNS, JR. Assistant Attorney General

APPROVED:

J. E. TAYLOR Attorney General

CBB/feh

MERIT SYSTEM

(1) Employees may voluntarily join or belong to a political club. (2) Employees may be solicited for membership. (3) Employees may make voluntary political contributions. (4) Unlawful to solicit political contributions from Merit System employees.

May 5, 1949

Hon. Ralph J. Turner
Director, Personnel Division
Dept. of Business and Administration
Jefferson City, Missouri

delierson City, Missouri

Dear Sir:

This is in reply to your request for an opinion, which reads, in part, as follows:

- "(1) Are Merit System employees prohibited under Section 43(e), Laws of Missouri, 1945, Page 1180, from voluntarily joining or belonging to any organization, association, or club, sponsored by a political party?
- "(2) Is it permissible under Section 43(d), Laws of Missouri, 1945, Page 1180, for any individual to solicit Merit System employees for membership in any organization, association or club sponsored by a political party?
- "(3) May Merit System employees make voluntary contributions to a political party, political candidate, any political publication or for any political purpose whatsoever under Section 43(d), Laws of Missouri, 1945, Page 1180?
- "(4) Is it permissible for any individual to solicit contributions from Merit System employees for a political party, political candidate, any political publication or for any political purpose whatsoever under Section 43(d), Laws of Missouri, 1945, Page 1180?"

We will answer your questions in the order submitted.

1. Are Merit System employees prohibited from voluntarily joining or belonging to a political organization or club?

Section 43(e), Laws of Missouri, 1945, page 1180 (Section 12851.42(e), Mo. R. S. A.), reads as follows:

"No employee selected under the provisions of this act shall be a member of any national, state, or local committee of a political party, or an officer of a partisan political club, or shall take any part in the management or affairs of any political party or in any political campaign, except to exercise his right as a citizen to express his opinion and to cast his vote. No employee in a position subject to this act shall be a candidate for nomination or election to any public office except after resigning, or obtaining a regularly granted leave of absence, from such position."

In order to answer your question, we believe it well to set out the provisions of Section 43(e), supra, so as to determine what prohibitions are contained therein. In this manner said section reads:

No employee selected under the provisions of this act:

- (1) Shall be a member of any national, state, or local committee of a political party, or an officer of a partisan political club, or
- (2) shall take any part in the management or affairs of any political party, or
- (3) (shall take any part) in any political campaign, except to exercise his right as a citizen to express his opinion and to cast his vote.

By a breakdown of Section 43(e), supra, we are unable to find any provision therein which directly prohibits membership in a political club. It is quite apparent that a Merit System employee may not be a member of a political party committee, and it is clearly spelled out in the act that he may not be an officer of a partisan political club.

In construing this act, we believe that the rule of strict construction should be applied. This, for either or both of two reasons. First, the statute would probably be construed in law as a penal statute. The test whether a law is penal, in the strict and primary sense, is whether the wrong sought to be redressed is a wrong to the public or a wrong to the individual. The term is, however, frequently extended to include any act which imposes a penalty, or creates a forfeiture, as a punishment for the transgression of its provisions, or the commission of some wrong, or the neglect of some duty. (50 Am. Jur., page 34.) Section 43(g), Laws of Missouri, 1945, page 1180, provides as follows:

"Any officer or employee in a position sub-, ject to this act who violates any of the foregoing provisions of this section shall forfeit his office or position."

It has been a well-settled general rule that penal statutes are subject to a strict construction. More accurately, it may be said that such laws are to be interpreted strictly against the state and liberally in favor of the accused. The rule is founded on the tenderness of the law for the rights of individuals; its object is to establish a certain rule, by conformity to which mankind would be safe, and the discretion of the court limited. (50 Am. Jur., page 430.) In the interpretation of a penal statute, the tendency is to give it careful scrutiny, and to construe it with such strictness as to safeguard the rights of the defendant. Hence, penal statutes are not to be extended in their operation to persons, things, or acts not within their descriptive terms, or the fair and clear import of the language used. Acts in and of themselves innocent and lawful cannot be held to be criminal unless there is a clear and unequivocal expression of the legislative intent to make them such. Whatever is not plainly within the provisions of a penal statute should be regarded as without its intendment. Such a statute should not be interpreted to impose restrictions on conduct not specifically enumerated in the legislative act, or to include cases omitted by the legislature, and which do not fall within the scope of the law. (50 Am. Jur., pages 433, 434.) Even

though Section 43(e), supra, were not considered as a penal statute, the rule of strict construction would still apply for the reason that the statute is a derogation of the natural rights of employees subject to the Merit System Act. The rule in this regard is well set out in the text of 50 Am. Jur., pages 421, ff., as follows:

"A rule of strict construction is generally applied to the interpretation of statutes in derogation of rights, either of the publie or of individuals, or in derogation of their natural rights, or rights which have been enjoyed from time immemorial. rule has been applied to rights of life, liberty, and the pursuit of happiness. prevails in cases of statutes which are in derogation of contract rights, or which impose restrictions on the conduct of business, or which are restrictive of a free economy. Statutes which take from or circumscribe the rights of citizens, either as given them by the common law or by former statutes and contracts arising thereunder affecting such rights, must be strictly construed against those seeking the deprivation, or circumscription of such rights under contract, and in favor of those whose rights are so affected. The general rule is that the scope of such statutes is not to be extended beyond the usual meaning of their terms. Indeed, no act should be construed as infringing upon such rights except by irresistibly clear, unambiguous, and peremptory language bearing no other construction. The burden lies on those who seek to establish that the legislature intended to take away the private rights of individuals, to show that by express words or by necessary implications such an intention appears. On the other hand, a statute involving a personal privilege or right conferred upon an individual by the constitution, is to be liberally construed in favor of the individual.

"The general rule is that statutes in derogation of the 'common right' are subject to a strict construction. 'Common right' is a term applied to rights, privileges, and immunities appertaining to, and enjoyed by, all citizens equally and in common, and which have their foundation in the common law. A strict construction is accordingly accorded to a statute which is in derogation of the equal rights of all. The rule has also been applied to a statute conferring special privileges upon one class in a community not enjoyed by others.

"Statutory authority in derogation of the common right may not be implied or inferred from vague or doubtful language, but must be given in express terms or by necessary implication. The statute is not to be extended beyond the exact and express requirements of the language used, but is confined to the subject specified including such as are necessarily within the contemplation of the legislation under review. A person claiming the benefit of the statute must bring himself plainly within its provisions.

"The general rule is that statutes enacted for the protection of personal liberty are to be liberally construed, and that statutes in derogation of personal liberty are to be strictly construed. Under this rule, no act of the legislature is to be construed as infringing upon the constitutional right of liberty, or upon liberties which have been enjoyed without question from time immemorial, except by clear, unambiguous, and peremptory language."

In approaching this problem we have examined Civil Service statutes from many jurisdictions and have also considered the

Civil Service sections of the charters of Kansas City and the City of St. Louis. Section 19 of Article 18 of the Charter of the City of St. Louis, as amended, concerning political activities of persons in the classified service, contains stronger language than is to be found in Section 43(e), supra. This section, however, carefully safeguards the right of city employees to belong to political organizations, to cast their votes as they please and to express privately their opinions upon political questions (State ex inf. McKittrick v. Kirby, 349 Mo. 988, 1.c. 990). Likewise, Section 126 of Article 5 of the Charter of Kansas City does not in express terms forbid employees in the classified service, and others specified, from becoming a member of a political club. It does state: "No officer or employee in the classified service of the city * * shall be a member or officer of any committee of any political party."

In the case of State ex rel. Weber v. Eirick, 192 N.E. 172, the court was considering a case on appeal wherein a person in the classified service of the city of Cleveland was summarily discharged for the reason, "Partisan Political Activity." The section of the charter which prohibited political activity read very similar to the one which we now have under consideration. In the opinion the court said, 1.c. 174:

"'Partisan political activity' is a very general term covering about everything and anything that has to do with matters political. There may be political activities that are not comprehended within the kinds enumerated in Section 140. This section specifically enumerates what activities are inhibited thereby. No classified employees shall influence political action of any person or body or coerce political action, or interfere with any nomination or election to public office, or act as an officer of a political organization or take part in a

political campaign or serve as a member of a committee of any such organization or circulate or seek signatures to any petition for primary or election or act as a worker in favor of or against any candidate for public office. It is not difficult to think of other activities of a clear political character that may not be within these classifications of activities."

From a careful reading of the act, and applying the rule of strict construction which we think is proper in this case under the above authorities, we believe that Merit System employees are not prohibited from voluntarily joining or belonging to a political organization or club. However, by the express terms of Section 43(e), supra, they may not be an officer of such club.

2. Is it permissible for any individual to solicit Merit System employees for membership in a political organization or club?

We have seen that the answer to your first question is that a Merit System employee may voluntarily join or belong to a political organization or club. For the same reasons as outlined above in answer to that question, we are unable to find any prohibition under Section 43(e), supra, against solicitation of Merit System employees for such membership. However, we believe it pertinent to consider Section 43(d), Laws of Missouri, 1945, page 1180 (Section 12851.42(d), Mo. R.S.A.), which reads as follows:

"No person shall orally or by letter, or otherwise, levy or solicit any financial assistance or subscription for any political party or candidate, political fund, or publication, for any political purpose whatsoever from any employee in a position subject to this act; and no employee in a position subject to this act; and no employee in a position subject to this act shall act as agent in receiving or accepting any financial contribution or subscription, or assignment of pay, for any political purpose whatsoever. No person shall use, or threaten to use, any direct or indirect coercive means to compel an employee in a position subject to this act to give such

assistance, subscription, or support, nor in retaliation for the failure of such employee to give such assistance, subscription or support."

If the solicitation of Merit System employees for membership in a political organization or club also involved a solicitation of financial assistance for such political party, we believe that such activity is forbidden by virtue of Section 43(d), supra. In this respect we refer to the rule contained in 50 Am. Jur., page 435, which reads as follows:

"A strict construction of penal statutes does not require the words to be construed so narrowly as to exclude cases that may be said to be fairly covered by them. * * In short, although criminal statutes are to be strictly construed in favor of the defendant, the courts are not authorized so to interpret them as to emasculate the statutes."

And, again in 50 Am. Jur., page 428, the rule is stated:

"Although a rule of strict construction is applied to a statute in derogation of the common law, it should nevertheless be construed sensibly and in harmony with the purpose of the statute, so as to advance and render effective such purpose and the intention of the legislature. The strict construction should not be pushed to the extent of nullifying the beneficial purpose of the statute, or lessening the scope plainly intended to be given thereto."

Therefore, in answer to your second question, we believe the rule to be that the mere solicitation of Merit System employees for membership in a political organization or club is not forbidden, but if such solicitation ultimately resulted in the seeking of financial assistance for a political party or candidate there would be a violation of Section 43(d), supra. 3. May Merit System employees make voluntary contributions to a political party, political candidate, any political publication, or for any political purpose whatsoever?

In answer to your question No. 2 we have set out Section 43(d), which generally prohibits solicitation of financial assistance for political purposes. Said section also prohibits a Merit System employee from acting as an agent in receiving or accepting any financial contribution for a political purpose. Lastly, it forbids the use of coercive means to compel a Merit System employee to give such assistance for political purposes.

For the reasons outlined in our answer to your question No. 1, we believe that Section 43(d) should be strictly construed and that cases which do not fall plainly within its provisions should be regarded as without its intendment. The act does not forbid the making of voluntary contributions for a political purpose, nor do we see how such a prohibition could be read into the act.

Again, in interpreting these sections, we refer to similar sections contained in the city charters in this state. Section 17 of Article 18 in the Charter of the City of St. Louis reads, in part, as follows:

" * * * No person in the classified service shall be under any obligation to contribute to any political fund or to render any political service, and no such person shall do so or be removed or otherwise prejudiced for refusing to do so. * * * * Underscoring ours.)

Section 126 of Article 5 of the Charter of Kansas City reads, in part, as follows:

" * * * No officer of employee in the classified service of the city, or auditor, director of personnel, or member of the personnel board, shall directly or indirectly give, pay, lend, or contribute any part of his salary or compensation or any money or other valuable thing to any person on account of, or to be applied to, the promotion of any political party or any political purpose whatever. * * *"

Hon. Ralph J. Turner

Thus, it is seen that in other Merit System (or Civil Service) Acts it was apparently thought that language similar to that in question here was not sufficient to prohibit voluntary political contributions. So, as seen above, more language was employed.

From a consideration of all the above, we believe that
Merit System employees may make voluntary contributions to a
political party, political candidate, any political publication,
or for any political purpose whatsoever. The statute is directed
at the solicitation of financial assistance and safeguards Merit
System employees from coercion to compel contributions and from
retaliation for the failure to make contributions. However, we
believe it well to point out separately that a Merit System employee may not act as agent in receiving or accepting financial
contributions for a political purpose.

4. Is it permissible for any individual to solicit political contributions from Merit System employees?

The first part of Section 43(d), supra, reads as follows:

"No person shall orally or by letter, or otherwise, levy or solicit any financial assistance or subscription for any political party or candidate, political fund, or publication, for any political purpose whatsoever from any employee in a position subject to this act; * * *"

We think it unnecessary to apply any rules of construction in answer to your last question. The law is well settled that where a statute is clear and unambiguous on its face there is no ground for the application of the rules for construction of statutes. Therefore, the answer to your last question is "no." It is not permissible for an individual to solicit political contributions from Merit System employees.

Conclusion.

Therefore, it is the opinion of this department that:

1. Merit System employees may voluntarily join or belong to a political organization or club.

2. The mere solicitation of Merit System employees for membership in a political organization or club is not forbidden.

- 3. Merit System employees may make voluntary contributions to a political party, political candidate, any political publication, or for any political purpose.
- 4. It is not permissible for any person to solicit contributions from Merit System employees for political purposes.

Respectfully submitted,

JOHN R. BATY Assistant Attorney General

APPROVED:

J. E. TAYLOR Attorney General

JRB:ml

LIQUOR
CRIMINAL LAW

Conviction of employee does not have effect of automatically revoking permit of licensee.

February 28, 1949



Honorable Jasper R. Vettori
First Associate Prosecuting Attorney
City of St. Louis
Municipal Courts Building
lith and Markets Streets
St. Louis, Missouri

Dear Sir:

This will acknowledge receipt of your request for an opinion which reads:

"I desire the benefit of an opinion from you in connection with the following matter:

"The various laws regulating the sale of intoxicating liquor and with respect to operating establishments where intoxicating liquor is sald in every instance regulates not only the licenses but also applies to an employee.

"For a violation of these various laws, Section 4909, Laws of Missouri, 1941, provides that conviction shall have the effect of automatically revoking the license of the person convicted. I am familiar with the case of Ex-Rel Henderson, 182 8.W. (2d) 292, holding that suspension or revocation of a license following a hearing by the Supervisor of Liquor Control is an exercise of discretion. The question is, does that apply where the law makes it mandatory to revoke the license on conviction? The second question is, does the conviction of an employee of the licensee for a violation of one of these laws make it mandatory that the license issued to the licensee be revoked? In posing this question I have in mind Regulation No. 15 of the Department of Liquor Control, where it is stated that licensees are at all times directly responsible for any act or conduct of any employee.

Section 4909, R. S. Mo. Anno., which is a part of the Liquor Control Act provides that a conviction in any court of any violation of the Liquor Control Act shall have the effect of automatically revoking the license of theperson convicted and further provides that if the defendant is finally acquitted he may apply and receive a license upon the payment of the regular license fee just the same as though he had never been licensed. Section 4909 reads:

"Conviction in any court of any violation of this Act shall have the effect of automatically revoking the license of the person convicted, and such revocation shall continue operative until said case is finally disposed of, and if the defendant is finally acquitted, he may apply for and receive a license hereunder, upon paying the regular license charge therefor, in the same manner as though he had never had a license hereunder; provided, however, that the provisions of this section shall not apply to violations of Section 4879, Article 1, Chapter 32, R.S. Mo. 1939, and violations of said Section 4879 shall be punished only as provided in said section."

Regulation 15 (a) promulgated by the Supervisor of Liquor Control, State of Missouri, makes licensees at all times responsible for the acts of the employees on the premises and reads:

"Licensees are at all times responsible for the conduct of their business and are at all times directly responsible for any act or conduct of any employee on the premises which is in violation of the Intoxicating Liquor Laws or the Nonintoxicating Beer Laws or the Regulations of the Supervisor of Liquor Control."

Section 4889, Mo. R.S.A., vests in the Supervisor of Liquor Control authority to make certain regulations, however this does not include the adoption of a regulation fixing punishments or penalties, and for violation of which he may suspend or revoke a license. Said provision concludes in the following language:

"* * and to make such other rules and regulations as are necessary and feasible for carrying out the provisions of this act, as are not inconsistent with this act."

To promulgate and adopt a regulation, authorizing an automatic revocation of a license for the violation of one of the supervisors own regulations by an employee of alicensee, would be inconsistent with the Liquor Control Act, for the reason that said act as shown herein only authorizes an automatic revocation when the licensee himself is convicted for violating any provision of the Liquor Control Act and no where refers to an automatic revocation for the conviction of an employee of said licensee. Section 4889 supra reads:

> "The supervisor of liquor control shall have the authority to suspend or revoke for cause all such licenses; and to make the following regulations (without limiting the generality of provisions empowering the supervisor of liquor control as in this act set forth) as to the following matters, acts and things; fix and determine the nature, form and capacity of all packages used for containing intoxicating liquor of any kind, to be kept or sold under this act; prescribe an official seal and label and determine the manner in which such seal or label shall be attached to every package of intoxicating liquor so sold under this act; this includes prescribing different official seals or different labels for the different classes, varieties or brands of intoxicating liquor; prescribe all forms, applications and licenses and such other forms as are necessary to carry out the provisions of this act; prescribe the terms and conditions of the licenses issued and granted under this act; prescribe the nature of the proof to be furnished and conditions to be observed in the issuance of duplicate licenses, in lieu of those lost or destroyed; establish rules and regulations for the conduct of the business carried on by each specific licensee under the license, and such rules and regulations if not obeyed by every licensee shall be grounds for the revocation or suspension of the license; the right to examine books, records and papers of each licensee and to hear and determine complaints against any licensee; to issue subpoenas and all necessary processes and require the production of papers, to administer oaths and to take testimony; prescribe all forms of labels to be affixed to all packages containing intoxicating liquor of any kind; and to make such other rules and regulations as are necessary and feasible for carrying out the provisions of this act, as are not inconsistent with this act."

of the 21st Amendment of the Constitution of the United States of a violation of any law applicable to the manufacture or sale of intoxicating liquor (See Section 4906, Mo. R.S.A.) however that does not have the effect of automatically revoking the permit of the licensee for a subsequent conviction of an employee for violation of the Liquor Control Act.

Section 31, Article 1, Bill of Rights, Constitution of Missouri 1945, prohibits even the Legislature from vesting such authority in the supervisor of Liquor Control or any commission, bureau, board or agency of the state by the adoption of a regulation fixing a fine or punishment. Section 31 supra reads:

"That no law shall delegate to any commission, bureau, board or other administrative agency authority to make any rule fixing a fine or imprisonment as punishment for its violation."

In Volume 12, Corpus Juris, Section 338, page 852, we find the following principle of law which reads:

"As a general rule, the legislature may not delegate to a commission the power to prescribe a penalty. It may, however, authorize a railroad commission to prescribe duties on which a statute imposing a penalty may operate, * * *"

Also see Section 333 of the same volume Corpus Juris, page 848 which reads:

"It is the function of the legislature, as a part of its police power, to make laws for the protection of the public health, and this power may not be delegated to an officer or board. The legislature, however, having enacted such laws in general terms, may confer on a board of health the duty of enforcing them, and to that end may give it authority to make reasonable rules and regulations which shall have the effect of law. The board may not itself prescribe a penalty for the violation of its regulations, but it is competent for the legislature to prescribe a penalty for the reafter made by the board."

See also State of Florida v. Atlantic Coastline Railroad Company, 32, L.R.A. (N.S.) 1.c. 638.

February 28, 1949

In Campbell v. Galeno Chemical Company 74, Lawyers Edition 1063, 1.c. 1069 and 1070, the court held that the power of the commission to make regulations, was not to authorize regulations providing for revocation of existing liquor permits in violation of express statutory provisions and in so holding the court said:

"The limits of the power to issue regulations are well settled. International R. Co. v. Davidson, 257 U. S. 506, 514, 66 L. ed. 341, 343, 42 Sup. Ct. Rep. They may not extend a statute or modify its provisions. * * *"

CONCLUSION-

Therefore it is the opinion of this department that a conviction of an employee of a licensee under the Liquor Control Act, does not of itself constitute an automatic revocation of his employers permit under said Liquor Control Act, however, if the employer continues his employment subsequent to said conviction it is grounds for the Supervisor of Liquor Control revoking said employers license after issuing a citation, giving due notice of a hearing and giving said licensee an opportunity to appear at said hearing and show cause why his permit should not be revoked.

Respectfully submitted,

AUBREY R. HAMMETT, JR. Assistant Attorney General

APPROVED

J. E. TAYLOR Attorney General

ARH:rm

LIQUOR
CRIMINAL LAW

Construing Sections 4881, 4891 and 4892 Mo. R.S.A. relative to employee of licensee making sale during restricted period under Section 4991.

July 21, 1949

7/26/49

Hon. Jasper R. Vettori
First Associate Prosecuting Attorney
City of St. Louis
14th and Market Streets
St. Louis, Missouri



Dear Sir:

This will acknowledge receipt of your request for an opinion which reads in part:

"I desire the benefit of your construction of Sections 4891 and 92 of
the Laws of 1939, as amended, pertaining to the hours of sale of intoxicating
liquor. Both of these Sections specifically apply to 'no person having a license
under the provisions of this act shall - - -'
As I construe these Sections, they apply only
to a licensee and not to a bartender or other
employee.

"Before me, at this time, is an application for an information against a bartender who was arrested at 3:50 A.M., after officers had observed him disposing of intoxicating liquor in a tavern where he is employed. The licensee in question was not present, but on the contrary, was and is confined in a hospital. From the information I have it will be impossible to show that the licensee had any knowledge of the commission of the offense, or in any way sanctioned it, but that in any event is not the question here. The question in the instant case is, under these Sections, can the bartender be successfully prosecuted?

"I take the liberty of calling your attention to Section 4881 and Section 4885 of the intoxicating liquor laws of the State of Missouri, and in each of those Sections, the statute specifically mentions, 'no person or employee', and it seems to me that if the

legislature had intended to penalize a bartender for a violation of the two Sections under consideration that would have so stated."

Your request does not relate to the licensee but under the facts related hereinabove you inquire if the bartender, an employee of said licensee, is subject to prosecution of disposing of intoxicating liquor in said licensed tavern during such time as provided in Section 4891 Mo. R.S.A., that the law prohibits the sale, giving away or otherwise disposing of same.

The provisions of Section 4891, Mo. R.S.A., makes it a violation of the law for any person having a license under the Liquor Control Act, to sell, give away or otherwise dispose or suffer the same to be done on or about his premises during certain periods. Said Section reads in part:

"No person having a license under the provisions of this Act shall sell, give away or otherwise dispose of or suffer the same to be done upon or about his premises, any intoxicating liquor in any quantity between the hours of 1:30 o'clock A.M. and 6:00 o'clock A.M. on week days and between the hours of 12:00 o'clock midnight Saturday and 12:00 o'clock midnight Sunday, * * *"

Another provision of the Liquor Control Act which is very similar to the foregoing provision is Section 4892 which reads:

"No person having a license under the provisions of this act shall sell, give away, or otherwise dispose of, or suffer the same to be done, upon or about his premises, any intoxicating liquor in any quantity between the hours of 1:30 o'clock a.m. and 6:00 o'clock a.m., and any person violating any provision of this section shall be deemed guilty of a misdemeanor."

Both of the said statutes under the Liquor Control Act specifically refer to "no person having a license under the act." Neither statute refers to an agent or employee of any person or licensee, as will be found in some statutes in the Liquor Control Act, such as referred to in your request, namely, Sections 4881 and 4885, Mo. R.S.A.

In this opinion, we are not requested to determine or pass upon the liability of the licensee who was not present, who apparently had no knowledge of such violation and who apparently did not sanction it, but the question presented herein relates to the liability of the bartender employee, who was caught in the act of disposing of liquor during a period prohibited under Section 4891, Mo. R.S.A.

One of the primary rules of statutory construction is to ascertain from language used the intent of lawmakers, if possible, and to put upon the language its plain and rational meaning in order to promote its object. (See Donnelly Garment Co. v. Keitel, 193 S.W. (2d) 577, 354 Mo. 1138; Fischbach Brewing Co. v. City of St. Louis, 95 S.W. (2d) 335, 231 Mo. App. 793.)

Another well established rule of statutory construction is that criminal statutes are to be construed liberally in favor of defendant and strictly against the state, both the charge and proof. Also that no person should be made subject of a criminal statute by implication and when doubt arises concerning their interpretation, such doubts are to be weighed only in favor of the accused. (See State v. Bartley, 263 S.W. 95, 304 Mo. 58; State v. Taylor, 133 S.W. (2d) 336, 345 Mo. 325. Also Abbott v. Western Union Telegraph Co., 210 S.W. 769.)

In view of the foregoing statutes making it a misdemeanor for a person having a license (and naming no one else in the statute) to sell, give away or otherwise dispose of intoxicating liquor during certain restricted periods and further in view of numerous instances in statutes under the Liquor Control Act, wherein the legislature has included agents and employees along with the licensee, we are inclined to believe that the provision of such statute hereinabove referred to do not apply to such employees as the bartender, in the instant case.

However, while Sections 4891 and 4892, supra, did not specifically make it a misdemeanor for an employee of a licensee caught in the act of disposing of liquor during such restricted period, such statutes do definitely prohibit the sale, gift or disposition of intoxicating liquor on licensed premises during such restricted periods mentioned in such statutes.

Another well established rule of statutory construction is that in construing an act all parts of said act should be construed together so as to harmonize and give meaning to each and every part thereof. (See Johnson v. Kruckemeyer, 29 S.W. (2d) 730, 224 No. App. 351; In re Kinsella's Estate, 239 S.W. 818. Also, State v. Wipke, 133 S.W. (2d) 354, 345 Mo. 283.)

In view of the foregoing rule, we find Section 4881, Mo. R.S.A., which prohibits any person, agent or employee of any person in any capacity from selling intoxicating liquor except during the time and place provided in the Liquor Control Act and regulations of the supervisor. Following the last rule of statutory construction referred to and construing Sections 4891, 4892 and 4881, Mo. R.S.A. together, we must conclude that the legislative intent was, that while Section 4891, supra, did not specifically include employees and agents of said licensee, however, Section 4891 does prohibit the sale or disposition of intoxicating liquors during those periods mentioned in said statute and under Section 4881, supra, agents and employees being prohibited from making any sales of intoxicating liquor at any other place than on the licensed premises or at any other time or otherwise than is authorized by the Liquor Control Act and regulations of the Supervisor, then we must conclude that if you can establish the fact that a sale of intoxicating liquor was made by said bartender during the time prohibiting such sales under Sections 4891 and 4892, supra, then the bartender is guilty of a misdemeanor under the Liquor Control Act. However, this only applies to a sale and not the giving away or merely disposing of said intoxicating liquors as indicated by Section 4891, supra.

Furthermore, if you find that it was a sale, then said bartender upon conviction may be found guilty of a misdemeanor under Section 4933, Mo. R.S.A. which makes it a misdemeanor for an employee to violate the Liquor Control Act.

CONCLUSION

Therefore it is the opinion of this department that if you can establish that a sale was made by said bartender at 3:50 A.M. then he is guilty of violating Section 4881, Mo. R.S.A. and is subject to a misdemeanor under Section 4933 Mo. R.S.A.

Respectfully submitted,

AUBREY R. HAMMETT, JR. Assistant Attorney General

APPROVED:

J. E. TAYLOR ATTORNEY GENERAL

TAXATION) Enlarged special road district entitled to proportionate share of road tax money thereafter collected in such enlarged special road district. 10/14/49 October 11, 1949 Honorable Raymond H. Vogel Prosecuting Attorney Cape Girardeau County Exchange Bank Building Jackson, Missouri Dear Sir: Reference is made to your request for an official opinion of this Department, reading in part as follows: "In September, 1949, the boundaries of the Cape Special Road District of Cape Girardeau County, Missouri, were extended in conformance with the provisions of Section 8708 of the Revised Statutes of Missouri. The taxes on the newly extended

"In September, 1949, the boundaries of the Cape Special Road District of Cape Girardeau County, Missouri, were extended in conformance with the provisions of Section 8708 of the Revised Statutes of Missouri. The taxes on the newly extended portion of the road district were, of course, assessed as of January 1, 1949. The question arises as to whether the 1949 taxes in the newly extended portion of the special road district shall be paid over to the road district under the provisions of Section 8691 and Section 8527 of the Missouri Revised Statutes.

* * * * * * *

"I should appreciate your opinion as to whether or not the 1949 taxes on property lying in the extended portion of the Cape Special Road District shall be paid to the road district by the county."

Section 8527, Missouri R.S.A., reads in part as follows:

"In addition to other levies authorized by law, the county court in counties not adopting an alternative form of government and the proper administrative body in counties adopting an alternative form

of government, in their discretion may levy an additional tax, not exceeding thirty-five cents on each one hundred dollars assessed valuation, all of such tax to be collected and turned into the county treasury, where it shall be known and designated as 'The Special Road and Bridge Fund! to be used for road and bridge purposes and for no other purpose whatever; provided, however, that all that part or portion of said tax which shall arise from and be collected and paid upon any property lying and being within any special road district shall be paid into the county treasury and four-fifths of such part or portion of said tax so arising from and collected and paid upon any property lying and being within any such special road district shall be placed to the credit of such special road district from which it arose and shall be paid out to such special road district upon warrants of the county court, in favor of the commissioners or treasurer of the district as the case may be: # # #

(Underscoring ours.)

Similarly, Section 8691, Missouri R.S.A., provides as follows:

"In all counties in this state where the special road district, or districts, has or have been organized, or where a special road district, or districts, may be organized under this article, and where money shall be collected for road and bridge purposes under the provisions of Section 8527 upon property within such special road district, or districts, or where money shall be collected for pool or billiard table licenses upon any business within such special road district, or districts, the county court shall, as such taxes or licenses are paid and collected, apportion and set aside to the credit of such special road district, or districts, from which said taxes were collected, four-fifths of such part or portion of said road and bridge tax so arising from and collected and paid upon any property lying and being within any such special road district, or districts, and also one-half of

the amount collected for pool and billiard table licenses so collected from such business carried on or conducted within the limits of such special road district; and the county court shell, upon application by said commissioners of such special road district, or districts, draw warrants upon the county treasurer, payable to the commissioners of such special road district, or districts, or the treasury thereof, for four-fifths of such part or portion of said road and bridge tax so collected upon property lying and being within such special road district, or districts, and also one-half of the amount collected for pool and billiard table licenses so collected from such business carried on or conducted within the limits of such special road district, or districts, or districts."

(Underscoring ours.)

From the foregoing statutes, it is apparent that the fact of collection of the taxes upon the property within the special road district is made the determinative factor as to whether or not such special road district is entitled to its pro rata share of such taxes. The time of assessment, levy, etc., is not considered, and, therefore, we conclude that under the facts outlined in your letter with respect to the time of extension of the boundaries of the existing special road district that such special road district is entitled to its pro rata share of all taxes thereafter collected upon property located within such extended special road district.

The problem of ascertaining property lying within the boundaries of the special road district as enlarged is quite simply solved. Your attention is directed to Section 8708, R. S. Missouri, 1939, wherein the scheme for the submission of the proposed extension of the boundaries of the special road district to the voters is outlined. After providing for the filing of the petition, notice of election, etc., this statute required the county court to examine the returns of the election, and if it be found that the proposition has carried, such court "shall make an order of record that the above specified road district laws shall extend to and be the law in such special road district, including the extension thereof, setting out the boundaries of said district as extended, the same to take effect and be in force from and after a day to be named in such order, said day to be not more than twenty days after said election."

CONCLUSION.

From the foregoing, we are of the opinion that road taxes collected on property lying within the extended boundaries of an enlarged special road district are to be apportioned to such special road district in accordance with Sections 8527 and 8691, Missouri R.S.A.

Respectfully submitted,

APPROVED:

WILL F. BERRY, JR. Assistant Attorney General

J. E. TAYLOR Attorney General

WFB/feh

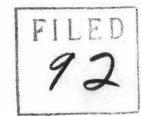
USURY:

Note given for the purchase price of an article exacts usurious interest if the note provides for a larger rate than the law allows. Interest charged for the use of money in excess of 2% per month constitutes usury.

November 21, 1949.

1/22/49

Hon. Jasper R. Vettori, First Associate Prosecuting Attorney Municipal Courts Bldg., lith & Market Streets, St. Louis, Missouri.



Dear Mr. Vettori:

This office is in receipt of your correspondence regarding excess interest charged on a loan made to finance the sale of a used car, in which the bill of sale given to the purchaser reads as follows:

"An individual purchased a used car and was given a bill of sale reading as follows:

Price		\$750.00	
Down	(Trade \$		
Payment	(Cash \$250.00		
Difference	10	\$500.00	
Time Difference and Insurance		50.00	D.D.
Time Balance		15.00	F.F.
Total Time Price		\$	9 - 50 - 50 - 60
1) NO 400 400 10 10 10 10 10 10 10 10 10 10 10 10 1		\$	

Time Balance payable in 11 installments of \$40.00 each payable on the 14 of every month beginning 7-14-49
12 monthly payments \$275.00 to be refinanced.

At the same time the purchaser executed a note in the amount of \$715.00 to the dealer, and of course, that figure is arrived at by the eleven monthly payments of \$40.00 each, plus the balance of \$275.00, which is to be refinanced."

The question is whether a usurious interest charge was made for the use of this money loaned.

Your attention is first directed to Section 4813, R. S. Mo. 1939, which reads as follows:

"Every person or persons, company, corporation or firm, and every agent of any person, persons, company, corporation or firm, who shall take or receive, or agree to take or receive, directly or indirectly, by means of

commissions or brokerage charges, or otherwise, for the forbearance or use of money or other commodities, any interest at a rate greater than two per cent per month, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by a fine of not less than one hundred dollars nor more than five hundred dollars, and by imprisonment in the county jail for a period of not less than thirty days nor more than ninety days. Nothing herein contained shall be construed as authorizing a higher rate of interest than is now provided by law."

In the case of General Motors Acceptance Corporation v. Wein-rich (262 S. W., 425), the court said:

"It is true, a loan may be cloaked in the outward form and appearance of a purchase, in which case that will not change the substance of the transaction nor hide the usury. But if there is a real and bona fide purchase, not made as the occasion or pretext for a loan, the transaction will not be usurious even though the sale be for an exorbitant price, and a note is taken, at legal rates, for the unpaid purchase money. The reason is that the statute against usury is striking at and forbidding the exaction or receipt of more than a specified legal rate for the hire of money and not of anything else; and a purchaser is not like the needy borrower; a victim of a rapacious lender, since he can refrain from the purchase if he does not choose to pay the price asked by the seller. So that a sale in good faith of property, merchandise, or of an indorsement, or guaranty, or even of credit, if the seller has no other interest in the transaction, is valid and not open to the objection of usury whatever the price. White v. Anderson, 164 Mo. App. 132, 136, 147 S.W. 1122. And if the sale be a real and not a pretended transaction, it will not make any difference even though the seller have a cash price and a larger price where the sale is on time or credit. If the buyer chooses to purchase on time and pay the larger price, the taking of a note for the latter will not constitute usury. Hogg v. Ruffner, 1 Black 115, 118-120, 17 L. Ed. 38.* * *." (Underscoring ours).

Following the above-cited case, we assume the "Time Difference and Insurance" of \$50.00 and the "Time Balance" of \$15.00 are valid charges not to be considered as interest, the balance due on the purchase price would be \$500.00 plus these two charges, or \$565.00. A note was executed for \$715.00 payable in eleven installments of \$40.00 each and the balance of \$275.00 to be then re-financed. From the information supplied, any amount charged in excess of the \$565.00,

representing the balance due on the purchase, would be considered interest paid for the use of money; i.e. the difference between \$555.00 and \$715.00 (the amount of the note executed by the purchaser) would be considered interest, and amount to \$150.00,

In the case of In re Bibbey, 9 Fed. (2d) 944, involving the sale of an automobile on time for more than cash price, the court said:

"It is manifest that any person owning property may sell it at such price and on such terms as to time and mode of payment as he may see fit, and such sale, if bona fide, cannot be usurious, however unconscionable it may be. A vendor may well fix upon his property one price for cash and another for credit, and the mere fact that the credit price exceeds the cost price by a greater percentage than is permitted by the usury laws is a matter of concern to the parties, but not to the courts, barring evidence of bad faith. * * *."

"There is no question but what the seller may name a greater price when he sells upon time than when he sells for cash, and that is not an unusual practice and custom in merchandising. Of course, in calculating the amount of addition to the cash price, where the goods are sold upon time, what would be a proper interest upon the investment is taken into consideration; the chances of loss and failure to pay, and the insurance necessary to cover the transaction, and the overhead expense for carrying on a business of that kind, all find a place in ascertaining how a merchant may profitably sell upon time and the price to be charged; but this does not make a usurious contract. This does not make it a loan of money, and the collection of interest is merely a method by which the seller calculates the amount that he must charge when selling upon time to make a profit,* * *."

While both the Weinrich and Bibbey cases hold a dealer has the right to sell a car on time for more than the cash price thereof the court also makes clear that a note given for the purchase price of an article may bear usurious interest. In this connection the wourt said in the Weinrich case cited above:

"The fact that a note is given for the purchase price of an article will not prevent the note from being usurious if the note calls for more interest than the law allows."

Under the circumstances set forth in your request for an opinion the purchaser executed a note for \$715.00 to cover the balance due on the purchase, of \$565.00 to be paid in eleven payments of \$40.00 plus a balance of \$275.00 which was to be refinanced. The

purchaser would pay in eleven installments \$440.00, which would be allocated \$90.74 as interest on unpaid balance and \$349.26 as payment on the principal if the interest rate is computed at 2% per month, the highest rate of interest allowed under the above quoted statute (R. S. Mo. 1939, Sec. 4813). Computing the interest at the rate of 2% per month would leave a balance due of \$215.74 rather than the \$275.00 which was the amount stated in the bill of sale to be refinanced. In order that there remain due \$275.00 after eleven installments are paid, a higher rate than 2% per month would necessarily be exacted.

It would appear then from the limited facts submitted that an interest charge in excess of 2% per month has been exacted.

In the holding of the Weinrich case in which the court said, "But if there is a real and bona fide purchase, not made as the occasion or pretext for a loan, the transaction will not be usurious even though the sale be for an exorbitant price, and a note is taken at legal rates, for the unpaid purchase money. * * * * Of course, the fact that a note is given for the purchase price of an article will not prevent the note from being usurious if the note calls for more interest than the law allows."

The interest to be charged on \$565.00 was to be \$150.00 during the period of time the eleven monthly installments were being paid. This charge would be in excess of 26% even if computed on the basis of the entire sum remaining unpaid for a year with the interest rate still higher when computed on the basis of interest charged on unpaid balance.

CONCLUSION.

Interest charged for the use of money in excess of 2% per month constitutes usury. A note given for the purchase price of an article exacts usurious interest if the note provides for a larger rate than the law allows.

APPROVED:

J. E. TAYLOR Attorney-General

JEM/LD

Respectfully submitted,

JOHN E. MILLS,

Assistant Attorney-General

MAGISTRATE JURIES:
CIRCUIT CLERKS:
BOARD OF JURY COMMISSIONERS:

Board of jury commissioners and circuit clerk to select magistrate juries in counties of the third and fourth classes.

FILED 93

March 18, 1949

3-21

Hon. W. R. Walker State Senator, 16th District Capitol Building Jefferson City, Missouri

Dear Senator Walker:

This is in reply to your letter requesting the official opinion of this department on the following question:

"Who has the authority to pick the Magistrate Court Jury, the Circuit Clerk or the County Clerk, since the law was passed making the Circuit Clerk Jury Commissioner?"

You have informed us that you have reference particularly to counties of the third and fourth classes.

The act of the Legislature relating to the selection of magistrate juries is found in the Laws of Missouri, 1947, Volume I, page 249. Said act prescribes certain duties to be performed by the county court and the clerk of the county court. Section 5 of that act provides that in all counties wherein grand and petit jurors are selected by a board of jury commissioners, such board of jury commissioners and the clerk thereof shall perform the duties imposed by said act upon the county court and clerk of the county court.

Section 704(a) of an act of the Legislature, found in Laws of Missouri, 1947, Volume II, page 274, creates a board of jury commissioners in each county of the third and fourth class, and further provides that the clerk of the circuit court of such county shall be ex officio clerk of said board of jury commissioners.

Thus, in counties of the third and fourth classes there exists a board of jury commissioners, the clerk of the circuit court of such counties serving as clerk thereof. Therefore, under the provisions of Section 5, supra, the board of jury commissioners and clerk of the circuit court in such counties shall perform the duties imposed upon the county court and clerk of the county court by said act in the matter of the selection of magistrate juries.

Conclusion.

Therefore, it is the opinion of this department that in counties of the third and fourth classes the board of jury commissioners and the clerk of the circuit court are required to perform the duties imposed upon the county court and clerk of the county court in said counties by the act of the Legislature, found in the Laws of Missouri, 1947, Volume I, page 249, in the matter of the selection of the magistrate juries.

Respectfully submitted,

ROBERT R. WELBORN Assistant Attorney General

RRW:ml

APPROVED:

J. E. TAYLOR Attorney General SAVINGS AND LOAN: Effective date of bill providing increase in salary of supervisor and employees.

August 27, 1949

Hon. Clarence Webb, Supervisor Savings and Loan Division Jefferson City, Missouri FILED 8/30/49

Dear Sir:

We have received your request for an opinion of this Department concerning the effective date of Section 9, of Senate Committee Substitute for Senate Bill No. 65, which was passed by the 65th General Assembly, with an emergency clause.

Senate Committee Substitute for Senate Bill No. 65 amended several provisions of the Savings and Loan Act, found in Laws of 1945, page 1578, Section 9 of the bill provides an increase in the salary of the Savings and Loan Supervisor from \$4,500.00 to \$6,000.00 per year. The maximum salary, which is determined by the supervisor, payable to the chief examiner is increased from \$3,000.00 to \$4,200.00, to the other examiners, from \$3,000.00 to \$3,600.00, and to other assistants and employees, from \$1,800.00 to \$2,400.00.

Section 4 of the Savings and Loan Act, (Laws of 1945, page 1578) provides that the supervisor of Savings and Loan Associations shall hold office at the pleasure of the Governor. Section 6 provides for the appointment by the supervisor of assistants, examiners, clerks, stenographers and other necessary, employees all of whom hold office at the pleasure of the supervisor.

Section B of Senate Committee Substitute for Senate Bill No. 65 declares an emergency and provides for the bill's becoming effective from and after its passage. Section 29, of Article 3, Constitution 1945, provides that a bill which contains an emergency clause is not subject to the ninety day period as to its effective date. Therefore, this bill, including Section 9,

would become effective immediately upon its approval by the Governor, which approval was given on August 3, 1949, unless by reason of the nature of the provisions of Section 9, that section cannot be regarded as coming within the emergency clause.

In the case of State ex rel Harvey v. Linville, 318 Mo. 698, 300 S.W. 1066, the Supreme Court held that a bill in effect providing an increase in the salary of the county superintendent of schools did not deal with such an emergency as the constitutional provisions contemplated and therefore the emergency clause was ineffective to accelerate the effective date of the bill. The bill in that case dealt solely with the computation of the salary of the county superintendent of schools.

The act here in question repeals seventeen sections of the Savings and Loan Act and enacts seventeen new sections in lieu thereof. Only one section, the section about which you have inquired, relates to salaries of personnel of the Savings and Loan Division. The remaining sections deal with various matters relating to the operation of Savings and Loan Associations. The emergency clause (Section B) reads as follows:

"Since the laws relating to the full investment and credit facilities of savings and
loan associations of this State are inadequate
to allow the resources of such associations to
be used to the fullest extent, and there is an
immediate and pressing need for additional
housing facilities which can be met in part by
savings and loan associations, and since it is
necessary for the immediate preservation of the
public peace, health and safety of the inhabitants
of this State, an emergency exists within the
meaning of the Constitution and this Act shall be
in full force and effect from and after its
passage."

The courts of this state have held contrary to the view taken in other states (Ann. 110 A.L.R., 1436) that the determining of the existence of an emergency by the legislature is not conclusive upon the courts and that they may determine for themselves whether or not an emergency exists within the meaning of the constitutional provision. State v. Sullivan,

283 Mo. 546, 224 S.W. 327. However, in neither this state nor in other jurisdictions which take the same position as Missouri with reference to the conclusiveness of the legislature's determination of the existence of an emergency, do we find any cases dealing with the extent of the effect of an emergency clause in a bill which contains matters which if enacted separately might be held to be not proper subjects of emergency.

In the present bill the matters recited in the emergency clause undoubtedly justify the legislature's declaration of an emergency. The other sections do not in any respect appear to have been added simply as a subterfuge to permit the increase in salary without the ordinary delay in the effective date of the act. The legislature must have intended that the entire act would become effective at the same time, otherwise, they would have provided for a different effective date as to other matters which they did not consider included within the emergency clause. See Laws of Missouri, 1945, page 765, 803. Under such circumstances and in the absence of any court decisions or other authority holding that provisions of an act such as this should be considered separately in determining the effectiveness of an emergency clause, we feel that the entire act should be considered as effective upon the date of the Governor's approval, or August 3, 1949, if there are no other constitutional provisions which might be involved.

The only other constitutional provision which might be involved in determining the effective date of Section 9 of the bill is Section 13 of Article 7 of the Constitution of 1945, which prohibits increasing the compensation of state officers during the term of office.

On August 2, 1947 in an opinion written to the Honorable Ben H. Howard, this department considered the question of whether or not the aforementioned constitutional provision was applicable to Senate Bill No. 181, of the 64th General Assembly which provided as increase in the compensation of the Commissioner of Finance and the employees of the Department of Finance. In that opinion, a copy of which is attached, it was held that the persons occupying the positions covered by the act were not state officers within the meaning of Section 13, of Article 7. The reasoning and conclusion of that opinion in that regard are applicable in the present situation.

Hon. Clarence Webb, Supervisor 4

CONCLUSION

Therefore, we are of the opinion that Senate Committee Substitute for Senate Bill No. 55, which amends the Savings and Loan Act and which contains an emergency clause, became effective immediately upon the bill's being signed by the Governor, and that Section 9 of said bill likewise became effective at such time.

Respectfully submitted,

ROBERT R. WELBORN Assistant Attorney General

APPROVED:

J. E. TAYLOR ATTORNEY GENERAL

RRW:nm

PROSECUTING ATTORNEYS: BUDGET LAW:

Increase in salaries of prosecuting attorneys effective July 7, 1949, is automatically included in the budget for the year 1949.

July 18, 1949

Honorable Joe C. Welborn Prosecuting Attorney Stoddard County Bloomfield, Missouri FILED 95

Dear Sir:

This is in answer to your letter of recent date requesting an official opinion of this department and reading as follows:

"I understand that the Governor has signed a bill placing additional duties on Prosecuting Attorneys, and providing that they shall receive additional compensation for those duties. I would appreciate an opinion from you as to when this bill becomes effective, and also as to the effect of the County Budget in not providing for additional compensation, on entitling the Prosecuting Attorney to the additional compensation for the remainder of the year 1949."

The official record of the Secretary of State's Office discloses that House Bill No. 297 of the 65th General Assembly, providing compensation for prosecuting attorneys in counties of the third and fourth class for certain added duties, was signed by the Governor, July 7, 1949. Such bill contains an emergency clause and by virtue of Section 29, Article III of the Constitution of Missouri, 1945, became effective on such date. In the case of Gill vs. Buchanan County 142 S.W. (2d) 665, the Supreme Court had before it for decision the question of whether or not the fact that the county court of Buchanan County had failed to provide in the budget for the full salaries of the county judges would preclude the recovery of such salaries by the judges. The court said, 1.c. 668:

"* * * They must be considered to be in the budget every year because the Legislature has put them in and only the Legislature can take them out or take out any part of these amounts. * * *" While it is true that in the Gill case, the law governing the amount of compensation to be paid to county judges was in effect at the time the county budget was made up by the county court, and in the present case House Bill No. 297 did not become effective until several months after the 1949 county budgets were made out, we believe the quoted portion of the Gill case to be applicable to the compensation provided for in House Bill No. 297. We therefore believe that by virtue of such bill, the compensation provided for therein is automatically included in the 1949 county budgets in counties of the third and fourth class.

CONCLUSION

It is the opinion of this department that House Bill No. 297 of the 65th General Assembly became effective July 7, 1949. It is further the opinion of this department that the compensation provided for in House Bill No. 297 for prosecuting attorneys is automatically included within the budget of counties of the third and fourth class.

Respectfully submitted,

C. B. BURNS, JR. Assistant Attorney General

APPROVED:

J. E. TAYLOR Attorney General PUBLIC SCHOOLS:

Tra nsfer by Board of Education of funds from Interest in Sinking fund to Building Fund: Transfer of interest and sinking fund balance is not permitted by section 10366 R.S.A. Mo. 1939, until both interest and principal of indebtedness for payment of which such funds were created has been pain its entirety.

March 3, 1949.

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Honorable Hubert Wheeler Commissioner of Education State Board of Education Jefferson City, Missouri

Dear Mr. Wheeler:

This will acknowledge your recent letter in which you request an opinion of this department. Your letter is as follows:

"Each year Boards of Education make an annual financial report to the State Department of Education. These reports are examined by giving consideration to their accuracy, completeness, and the fund accounting of all receipts and expenditures as provided by law. It often becomes necessary to make suggestions to Boards relative to their fund accounting and request that adjustments be made in order that the report may be approved. A difference of opinion has arisen relative to the transfer of moneys from the sinking and interest funds.

Section 10501 provides among other things that the Board of Education shall make and publish annually a detailed report of all receipts and expenditures of school moneys, and a secretary shall forward a copy to the State Board of Education. The State Board of Education is prohibited from releasing state aid to the district until the report has been received in Jefferson City and approved.

Section 10366, as amended in laws of 1943,

page 893, is the general law providing for school fund accounting of all receipts and expenditures for school districts. This law contains the following clause about which the question of transfer has arisen:

"Provided further, that in the event
of a balance remaining in the sinking or
interest funds, after the total outstanding indebtedness for which said funds were
levied is paid, the said board shall have the
power to transfer such unexpended balances
to the building fund."

Section 10328 authorizes school boards to borrow money for the purchase of sites, erection of school buildings and the repair and furnishing of buildings when authorized by the voters of the district.

Section 10331 provides that loans shall not be contracted for a longer period than twenty years and shall not exceed an amount in the aggregate of five per centum of the assessed valuation of tangible property. This act further provides that the school board shall levy an annual tax rate, sufficient to pay the interest as it falls due, and also to constitute a sinking fund for the payment of the loan within the time it shall become due.

There are those who interpret the provision of the law relative to the transfer of money from the sinking and interest fund to mean that the Board may make such transfer of surplus funds after the indebtedness each year has been paid. Others hold to the interpretation that this clause means transfers can

Hon. Hubert Wheeler - 3 -March 3, 1949 . only be made after the entire outstanding bond indebtedness has been paid, indicating that all the moneys raised for the sinking and interest fund must be used for meeting the full loan obligations of the district until it has been liquidated. I shall be glad to have your advice and official opinion in regard to the following question: 1. Does the School Board have the authority to transfer balances remaining in the sinking or interest funds each year after the indebtedness for that year has been paid, or does the provision of the law for transferring such funds permit the transfer only after all outstanding obligations covering the entire loan have been paid." We have considered the question propounded, together with the attached correspondence, and what we believe to be the applicable statutes. We suggest that the portion of section 10366, R.S.A. Missouri 1939, which reads: "Provided further that in the event of a balance remaining in the sinking or interest funds, after the total outstanding indebtedness for which said funds were levied is paid, the said board shall have the power to transfer such unexpended balances to the building fund " "" shall be construed in the light of the following quoted portion of section 10331, R.S.A. Missouri 1939: "" " " It shall be the duty of the directors to provide for the collection of an annual tax sufficient to pay the interest on said indebtedness as it falls due and also to constitute a sinking fund for the payment of the principal thereof within the time said principal shall become due. "

As will be seen from the last above quoted language, it is the duty of the school directors to provide for the collection of an annual tax which must be sufficient to raise enough money to do two things; one of them being to pay the interest for the year on the existing school debt, and the other being to provide money to be paid into a sinking fund sufficient to pay the principal of the debt when supplemented by successive annual payments on or before the due date thereof. We are of the opinion that all money provided annually by said tax which is not used for payment of the annual interest must go not into a separate sinking fund for the year of the collection of the tax to be supplemented annually by enough successive separate sinking funds to pay the principal when due, but into a single sinking fund to be added to each successive year sufficiently to make the fund adequate to pay the principal of the school debt on or before the due date thereof.

We are, therefore of the opinion that since there is but one sinking fund increasing annually in amount, the provision of section 10366, supra, to the effect that; "In the event of a balance remaining in the sinking or interest funds after the total outstanding indebtedness for which said funds were levied is paid, the board shall have the power to transfer such unexpended balances to the building fund", is operative only in the event that both the interest and principal of the school debt has been paid to the payee of the debt.

We can not agree with those who hold the view that the tax is levied annually only to pay the annual interest and that fractional part of the principal, which if paid annually, would discharge the indebtedness exactly when due and no earlier. While we concede that the objective of the statute is to provide for such tax as will when paid annually provide the exact amount required to pay the interest annually and the principal at the exact due date, we are of the opinion that the Legislature, when it enacted this law, recognized that no one could so accurately forecast the tax yield of a given rate of taxation as to make it possible to build up a sinking fund that would provide the exact amount needed to pay the indebtedness when due, and no more nor less. We are of the opinion further that the legislature realizing that no such accuracy could be expected, anticipated that the tax rate would be made high

- 5 -Hon. Hubert Wheeler March 3, 1949 enough to render it certain that a sinking fund adequate to pay the indebtedness when due would be provided, and anticipated further that this might result in an excess of revenue, or balance in the fund after the payment of the debt, and for that reason, enacted the above quoted provision for the transfer of such balance by the board to the building fund. CONCLUSION. We are, therefore, of the opinion that there is no balance transferrable by the school board from the interest or sinking funds until the total indebtedness has been discharged, but that if after paying both the interest and the principal of the indebtedness, there is a balance remaining, the balance may, and must be transferred to the building fund. Respectfully submitted, SAMUEL M. WATSON Assistant Attorney General APPROVED: J. E. TAYLOR Attorney General SMW:p

Marriage of pupil is not grounds for dismissal.

May 13, 1949

FILED 96

Honorable Hubert Wheeler Commissioner of Education State Department of Education Jefferson City, Missouri

Dear Mr. Wheeler:

SCHOOLS:

This department is in receipt of your request for an official opinion which reads as follows:

"Do the laws of this State authorize boards of education to establish such rules for the regulation and control of the schools which would deny students who are under twenty years of age the privilege of attending school and receiving proper credits after they have married?"

Section 1(a), Article IX of the Constitution of Missouri, 1945, provides that:

"* * * the general assembly shall establish and maintain free public schools for the gratuitous instruction of all persons in this state within ages not in excess of twenty-one years as prescribed by law. * * * ."

Section 10340, R.S. Mo. 1939, provides, in part, as follows:

"The board shall have power to make all needful rules and regulations for the organization, grading and government in their school district * * *. They shall also have the power to suspend or expel a pupil for conduct tending to the demoralization of the school, * * * ."

Under the provisions of the above statute a school board may make all needful rules and regulations for the government and conduct of the school, and may expel any

pupil who violates such rules and regulations. However, it has been uniformly held in this state that, in order for a board to expel a pupil for violation of a rule, the rule must be reasonable. Wright vs. Board of Education of St. Louis, 295 Mo. 466, 246 S.W. 43; King vs. Jefferson City School Board, 71 Mo. 628.

We must, therefore, determine whether a rule of a school board that provides that the marriage of a pupil is grounds for expulsion is a reasonable rule. The general rule is stated in 47 Am. Jur. 412, as follows:

> "* * * However, a pupil may not be excluded from school because married, where no immorality or misconduct of the pupil is shown, nor that the welfare and discipline of the pupils of the school is injuriously affected by the presence of the married pupil."

The identical question was presented in McLeod vs. State ex rel. Miles, 122 So. 737. This case, as was stated in 63 A.L.R. 1164, "is the only case found, either American or British, involving an attempt to exclude a pupil from a public school upon the ground of marriage; ."

Upon a set of facts identical with that presented in your request, the Supreme Court of Mississippi said in the McLeod case:

"The question, therefore, is whether or not the ordinance in question is so unreasonable and unjust as to amount to an abuse of discretion in its adoption. No case directly in point is referred to in the briefs. The ordinance is based alone upon the ground that the admission of married children as pupils in the public schools of Moss Point would be detrimental to the good government and usefulness of the schools. It is argued that marriage emancipates a child from all parental control by its conduct, as well as such control by the school authorities; and that the marriage relation brings about views of life which should not be known to unmarried children; that a married child in the public schools will make known to its associates in schools such views, which will therefore

be detrimental to the welfare of the school. We fail to appreciate the force of the argument. Marriage is a domestic relation highly favored by the law. When the relation is entered into with correct motives, the effect on the husband and wife is refining and elevating, rather than demoralizing. Pupils associating in school with a child occupying such a relation, it seems, would be benefited instead of harmed. And, furthermore, it is commendable in married persons of school age to desire to further pursue their education, and thereby become better fitted for the duties of life. And they are as much subject to the rules of the school as unmarried pupils, and punishable to the same extent for a breach of such rules.

"We are of opinion that the ordinance in question is arbitrary and unreasonable, and therefore void."

The Supreme Court of Missouri in passing upon the reasonableness of a rule of the Board of Education of the City of St. Louis, which provided that the marriage of any lady in the employ of the board is considered as a resignation and no married woman is to be appointed to a position, held: "Our conclusion is that the board's rule requiring the removal of women teachers solely on the ground of marriage is unreasonable and arbitrary and violated the intent of the then applicable statute." (State ex rel. Wood vs. Board of Education of City of St. Louis, 206 S.W. (2d) 566, 1.c. 568).

Therefore, it would appear that a rule of a school board which provides that a pupil may be expeled on the sole grounds that said pupil married during the time he or she was a pupil is arbitrary and unreasonable, and that such a ground is not a proper one in order to allow the board to expel the pupil.

CONCLUSION

It is, therefore, the opinion of this department that a rule and regulation of a school board which denies

students under the age of twenty years the privilege of attending school and receiving proper credits after they are married is arbitrary and unreasonable and it is not within the power of the board to make such a rule.

Respectfully submitted,

ARTHUR M. O'KEEFE Assistant Attorney General

APPROVED:

J. E. TAYLOR Attorney General

AMO'K:ir

SCHOOLS:

State Board of Education authorized to adjust and settle boundary dispute when matter is submitted by contending county boards of education under subparagraph (4) of Section 6, S. B. No. 307, Laws of Mo. 1947, Vol. II, p. 370.

June 8, 1949



Hon. Hubert Wheeler Commissioner of Education Division of Public Schools Jefferson City, Missouri

Dear Mr. Wheeler:

This department is in receipt of your request for an official opinion which reads as follows:

"County boards of education, under the law governing school district reorganization have proposed in the various counties of this State specific plans for reorganization. In several of the counties it has become necessary to propose enlarged districts which includes territory in two or more counties. The boards of education of the counties involved have, in a number of cases, failed to agreeon boundary locations. Such county boards have indicated their failure to reach a cooperative agreement and have presented their specific proposals to the State Board of Education for final decision.

"Paragraph 4 of Section 6, Senate Bill 307, page 373, of the 1947 Laws, Vol. II, provides that any and all reorganization questions shall be submitted to the State Board of Education for final decision. The State Board, in its consideration of disputed questions, has found it possible to designate one or the other proposals as acceptable. However in other cases of boundary disputes a different grouping of the districts than those proposed by the county boards seem to be advisable. The question involved is whether or not the State Board shall confine its decision to the specific proposals in dispute or use its discretion in adjusting the boundary to what would seem to be a more satisfactory boundary location.

"I shall be glad to have your advise and official opinion in answering the following question:

Hon. Hubert Wheeler.

"1. Is the State Board required to make its decision on the specific boundary dispute as proposed by county boards of education or would it have power to make its decision by designating what would appear to be a more satisfactory boundary location within the disputed area?"

Under the provisions of subparagraph (4) of Section 6, of Senate Bill No. 307, Laws of Missouri 1947, Vol. II, page 370, each county board of education is directed to cooperate with boards of adjoining counties in the solution of common organization problems, and to submit to the State Board of Education for final decision any and all organization questions on which the cooperating boards fail to agree.

This school reorganization law contemplates that in certain instances the law's purpose will best be attained by so locating a reorganized district as to cause the boundries thereof to lie in adjoining counties. With each county board of education facing the task of submitting its own county wide plan of reorganization to the State Board of Education, and such plan necessarily including in some instances proposed districts lying in different counties, the Legislature wisely anticipated the conflict in views that would arise between county boards of education. If such conflict could not be definitely resolved before each county board of education submitted its county wide plan of reorganization to the State Board of Education, the county board of education would not be in a position to submit a definite and workable plan in view of other provisions of the law which call for submission of the plan to voter approval after action by the State Board of Education.

The submission of a boundary dispute between two county boards of education to the State Board of Education under the provisions of subparagraph (4) of the law heretofore referred to will result in a final decision so necessary to allow each county board of education to get its county wide plan of reorganization in form to present to the State Board of Education for initial approval or disapproval. The question necessarily arises as to just how the State Board of Education may proceed to make a final decision on a boundary dispute between county boards of education touching this common organization problem. A final decision in such instances must result in a single boundary decision which will be incorporated in the county wide plan of reorganization to be submitted by each of the counties involved. A decision with less effect would not foster cooperation

Hon. Hubert Wheeler.

between the disputing boards of education. The final decision to be made in cases of this kind may be to a degree onerous to each of the disagreeing boards of education, but we find such a decision necessary to make the law feasible in its orderly administration.

If the State Board of Education, in making the final decision on a single boundary dispute, deems it necessary to veer from the plans and contentions of the disputing county boards of education, it may designate a boundary location within a disputed area, the same to become a part of the county wide plan of reorganization to be submitted by each contending county board of education. To hold otherwise would lead to unnecessary confusion in the workability of the law and would result in recognizing the authority of the State Board of Education to make a "final decision" in such matters without attendant authority and discretionary power to effect such decision.

CONCLUSION

It is the opinion of this department that when county boards of education in adjoining counties submit to the State Board of Education a common organization problem for final decision under the provisions of subparagraph (4), Section 6, Senate Bill No. 307, Laws of Missouri 1947, Vol. II, page 370, the State Board of Education, may resolve the question for each of the disputing boards of education without adopting the specific recommendation of any one of the county boards of education.

Respectfully submitted

JULIAN L. O'MALLEY Assistant Attorney General

APPROVED:

J.E. TAYLOR ATTORNEY GENERAL

JLO'M:A

PROSECUTING ATTORNEYS: SCHOOLS:

Prosecuting Attorneys are required to represent and defend County Superintendents of Schools in civil suits filed against such officials involving their official acts.

November 29, 1949

Honorable Hubert Wheeler Commissioner of Education State Capitol Building Jefferson City, Missouri FILED 96

Dear Sir:

In answer to your recent request for an opinion from this department, we first quote your request excepting the portion thereof making reference to opinions, laws and court decisions as follows:

"Inquiry has come to this Department concerning the laws of this State governing the powers and duties of county officials in relation to the enforcement of laws governing the public schools of this State.

"The case in question involves Audrain County, in which the County Superintendent of Schools denied the assignment of elementary pupils living in a common school district adjacent to the School District of Mexico. The parents of the school children who were denied assignment, employed the County Prosecuting Attorney as counsel to bring a mandamus suit in circuit court to compel the County Superintendent of Schools to make an official assignment as provided in Senate Bill 308, Section 10461, Laws of 1945. The County Superintendent of Schools employed an attorney to defend his action in refusing to make assignment. The employment of such counsel involved an expenditure of money. The circuit court, in this case, denied the petition for mandamus action.

"This problem seems to be one of general interest, since such action may be taken in any county of this State wherever a request is made for the official assignment of public school pupils. County superintendents of schools will need to know how to secure legal counsel when necessary,

for carrying out their official duties in the administration of school laws.

* * * * * * * * *

"I shall be glad to have your advice and official opinion in regard to the following questions:

- "1. Is the county superintendent of schools entitled to the legal counsel of the prosecuting attorney under the provisions of Section 12942 in the defense of his official actions in administering the school laws under his jurisdiction?
- "2. If Section 12942 does not include the defense of the county superintendent of schools by the prosecuting attorney, in the administration of the laws governing public schools, what would be the proper source of legal counsel for such county official and who would be responsible for paying both counsel and court costs?"

In the case of State ex rel. Trash v. Lamb, 237 Mo. 437, decided by the Supreme Court of Missouri in 1911, the court had occasion to review the history of legislation in Missouri concerning the duties and powers of prosecuting attorneys, and such review commences with a discussion of the Missouri territory law as it stood in 1806, which provided for an attorney general for the territory, and traced subsequent enactments touching the offices of attorney general, circuit attorneys and prosecuting attorneys in Missouri up until the date of such decision, at which time the court was construing Section 1007, R. S. Mo. 1909, which section remains unchanged in our present laws at Section 12942, R. S. Mo. 1939.

An excerpt from the opinion just referred to will fully acquaint us with the scope of authority to be exercised by the prosecuting attorneys under our present statute, Section 12942, R. S. Mo. 1939.

The court spoke as follows in 237 Mo. 437, 1.c. 450:

"The history of this legislation shows that, since 1825, it has been the policy of this

.

State, as indicated by the various acts passed by the Legislature, to impose upon the local State's attorney, whether known as the circuit or prosecuting attorney, the duty of instituting proceedings in behalf of the State in matters arising within his local jurisdiction. From 1824 to 1955 the Attorney-General acted as circuit attorney in the circuit within which the seat of government was located. From 1855 to 1868 the Attorney-General had no such power. During that period the right to institute proceedings in behalf of the State was in the circuit attorneys exclusively. Since 1868 the statutes have been substantially as they are now; section 1007, Revised Statutes 1909, authorizing the prosecuting attorney to commence proceedings in matters concerning the State within his county, and section 970, Revised Statutes 1909, imposing duties upon the Attorney-General in substance like those provided in the Act of 1868 above quoted.

"Whatever may be the proper construction of section 970 as to the duties of the Attorney-General, it is clear that during all the time since the early territorial days the local State's attorney has been the proper legal representative of the State to institute proceedings in behalf of the State, and in no respect has that power been curtailed by legislation.

"In a strict historical sense, the prosecuting attorney represents the State and exercises powers analogous to those exercised by the Attorney-General in England.

As was said by the Supreme Court of Michigan: 'The prosecuting attorney is a very responsible officer, selected by the people and vested with personal discretion intrusted to him as a minister of justice, and not as a mere local attorney.' (Engle v. Chipman, 51 Mich. 524.)

"The sovereign power of government can only be exercised through its officers. Consequently, to each officer is delegated some of the powers and functions of government. * * " Section 12942, R. S. Mo. 1939, expressly provides that "the prosecuting attorney shall commence and prosecute all civil and criminal actions in their respective counties in which the county or state may be concerned, defend all suits against the state or county, * * * ." Section 12944, R. S. Mo. 1939, provides that the prosecuting attorney "shall prosecute, or defend, as the case may require, all civil suits in which the county is interested, * * * ."

Neither the word "concerned" nor the word "interested" is defined in the statutes just referred to, but one of the definitions given for the word "concerned" is "affected, disturbed, troubled, interested; as to be concerned for one's safety." Webster's New International Dictionary (2nd Edition).

An answer to the first inquiry made must rest on the determination of whether the county is "interested" or "concerned" in a suit brought against the county superintendent of schools in his official capacity to compel him, by mandamus, to make an assignment of pupils pursuant to authority contained in Section 10461, R. S. Mo. 1939, as repealed and reenacted, Laws of Missouri, 1945, page 1663, Such section reading as follows:

"Whenever any pupil is so located that an adjoining school is more accessible, the county superintendent shall have the power and it shall be his duty to assign such pupil to such adjoining district: Provided, if a school district shall be divided by a county line, or it is deemed advisable to assign pupils to a district in an adjoining county, then the county superintendent of the county wherein the pupil resides shall make the assignment, subject to an appeal to the state board of education by any county superintendent whose county is affected, and the decision of the state board of education shall be final: Provided, the attendance of such assigned pupil shall be credited for the purpose of apportionment of state funds to the district in which the student lives, and the board of directors of the district in which said student lives shall pay the tuition of such pupil or pupils so assigned: Provided, such tuition shall not exceed the pro rata cost of instruction."

In this opinion we do not rule on the right of any person to employ the writ of mandamus to compel compliance with Section 10461, R. S. Mo. 1939. Our concern is solely with the duty of the prosecuting attorney, if any, to represent the county superintendent of schools in the event such litigation is commenced. No citation of authority is necessary for us to conclude that the county superintendent of schools is a public officer to whom some of the sovereign functions of government have been delegated by the state, to be exercised by such official for the benefit of the public. Section 10461, supra, is a clear example of such delegation of a governmental function. When a county superintendent of schools is made a defendant in a legal action to compel him, in his official capacity, to perform, or perform in a certain manner, duties prescribed by statutes applicable to his office, it seems that the "interest" and "concern" of the county is readily apparent.

In the case of State ex rel. v. Wurdeman, 183 Mo. App. 28, 166 S.W. 348, the St. Louis Court of Appeals had occasion to construe Section 1007 and Section 1008, R. S. Mo. 1909 (Section 12942 and Section 12944, R. S. Mo. 1939), which remain unchanged in their language to this date. A quotation from the opinion rendered in the case just cited discloses the nature of such action and its analogy to the question now being considered. At 183 Mo. App., 1.c. 36, the court spoke as follows:

" * * * In an early case in this court, the prosecuting attorney * * * declined to permit the use of his name in a certiorari proceeding against the county court to remove and review the record of a dramshop proceeding, for that he deemed it his duty, under the statute, to represent the interests of the county, through appearing for the county court in the matter, and this court affirmed such to be the correct view of the duty of the prosecuting attorney. (State ex rel. v. Heege, 37 Mo. App. 338, 345.) Obviously, such is the sound law of the question, for, though the judges of the county court themselves are respondents in the mandamus suit pending in the circuit court, it is clear the county is interested therein. The statutes (sections 1007 and 1008) are to be read together for they are in pari materia and pertain alike to the duties of the prosecuting attorney, which they annex to his office, and the officer is required by virtue of his oath to perform them While section

1007, in so far as its consideration here is essential, applies more particularly to cases in which the county is concerned and suits against it, section 1008 imposes a duty on the prosecuting attorney in respect of all civil suits in which the county is 'interested.'

"It is clear that the county is interested in a civil suit in mandamus directed against the judges of the county court by which it is sought to compel them, through utilizing the franchises of their office, to issue a dramshop license in favor of any citizen, authorizing him to sell intoxicating liquors in the county. In respect of this matter, it is to be said the judges of the county court, as individuals, apart from their office and the franchises which inhere in it could confer no privilege under the law, and it is only because of their office as county judges that they may be compelled to act thereon at all, and this is true though the writ runs against them as judges of the county court, rather than against the office of the county court eo nomine. The idea is to compel the judges, as individuals in whose hands the franchises pertaining to the office are accumulated, to exercise the powers of the office in acting upon the application for a dramshop license and thus proceed in the performance of a public duty affixed by statute. To say that St. Louis county is not even interested in such a proceeding involves but a partial view of the subject-matter. Under our statutes the county is pecuniarily interested in the matter of dramshop licenses, for a portion of the revenue received therefor goes into its treasury.

" * * * When it is remembered the county is the unit of government with respect of such matters, it appears to be clear enough that it is interested in a civil suit against the judges of the county court, which proceeds with a view of enforcing them, ex officio, to act upon an application for a dramshop license. Therefore, the county

being interested in the subject-matter of the mandamus suit against the judges of the county court, the statute (Sec. 1008) imposed the duty upon the prosecuting attorney to control and defend that case. His right no one can dispute, for the statute pointedly prescribes and affixes it as a duty upon him in all cases in which the county is interested, and this, too, in addition to the duties affixed by the prior section (1007) where the suit is against the county."

In considering the nature and purposes of duties prescribed and to be performed by the county superintendent of schools in compliance with directives contained in Section 10461, R. S. Mo. 1939, in carrying out the public trusts imposed on such official, it would be unreasonable to conclude that the "interest" and "concern" of the county and state in the proper performance of such duties should be restricted to an "interest" and "concern" that might be measured only in terms of pecuniary interest.

In the case of State ex rel. Thrash v. Lamb, cited supra, the Supreme Court of Missouri quoted approvingly from Throop on Public Officers, 1.c. 453, as follows:

" * * * 'Acts of public officers acting on behalf of the State, within the limits of the authority conferred on them, and in the performance of their duties, are the acts of the State.'"

In the opinion request there was no suggestion that the county superintendent of schools was not acting, or refusing to act, within the scope of authority contained in Section 10461, R. S. Mo. 1939. His acts were official acts, and from the very character of such acts, the county as well as the state was "interested" and "concerned."

This department has previously ruled in an opinion dated September 4, 1943, and addressed to the Prosecuting Attorney of Boone County, Missouri, that the language of Section 12944, R. S. Mo. 1939, makes it the duty of the prosecuting attorney to advise the county superintendent of schools in matters of law in which the county is interested. It is this same section which makes it the duty of the prosecuting attorney to "defend" all civil suits in which the county is interested. It necessarily follows that the "interest" and "concern" of the county

and state, in the official acts of the county superintendent of schools, as heretofore outlined, makes it the duty of the prosecuting attorney to represent the county superintendent of schools in defending against civil suits in order for the prosecuting attorney to comply fully with the directives contained in Section 12942 and Section 12944, R. S. Mo. 1939. However, this general rule must admit of an exception in those cases where the prosecuting attorney, in his official capacity, and in the interest of the county and state, institutes an action on behalf of the state and county against such public official. The right and duty of the prosecuting attorney to proceed in his official capacity against a public official, when he deems the acts of such official to be in violation of statutory directives and adverse to the interest of the state and county, must be recognized at all times.

Having concluded that language contained in Sections 12942 and 12944, R. S. Mo. 1939, is sufficiently comprehensive to include the defense of the county superintendent of schools in the administration of the laws governing public schools, the second question posed in your inquiry is not a subject for disposition in this opinion.

CONCLUSION

It is the opinion of this department that the county and the state are both "interested" and "concerned," as those terms are used in Sections 12942 and 12944, R. S. Mo. 1939, when the county superintendent of schools is made a defendant in a civil action touching his official acts in administering the school laws within his jurisdiction, and it is the duty of the county prosecuting attorney to defend and represent the county superintendent of schools in such action.

Respectfully submitted,

JULIAN L. O'MALLEY Assistant Attorney General

APPROVED:

J. E. TAYLOR Attorney General HEALTH, DIVISION OF:

Members of State Hospital Advisory Council serve until successors appointed.

February 18, 1949

Dr. John W. Williams, Jr. Director, Local Health and Hospital Administration Division of Health Jefferson City, Missouri

FILED
97

Dear Sir:

We have received your request for an opinion of this department, which request is as follows:

"A question has arisen regarding status of the State Hospital Advisory Council created by the 1945 Legislature and found on page 972, Laws of Missouri, 1945. Public Law 725, 79th Congress, Section 612, A(2), requires a state to have a State Advisory Council in its administration of this law.

"The question now arises for which we would like to have an opinion.

"Does the present State Advisory Council carry over or did the present law expire at the end of the two years for which the members of the Council were appointed?

"Failure of the state to comply with the Federal Law would jeopardize our whole hospital construction program."

The State Advisory Council was created by an act of the 63rd General Assembly, Laws of 1945, page 972. Section 2 of that act provides:

"There is hereby created a State Advisory Council of seven members, who shall be

appointed by the governor by and with the advise and consent of the Senate. Each member of the State Advisory Council shall serve for a term of two years from and after his or her appointment and confirmation. Said Advisory Council shall be composed of citizens of this state who have resided in this state not less than five years immediately prior to their appointment and shall include at least two representatives of the consumers of hospital service, with the other members representing state government and nongovernment organizations in the state which are familiar with the needs of health services in urban and rural areas of the state. The members of this council may not receive any compensation other than for actual travel and subsistence when acting officially as members of the Advisory Council. The Advisory Council shall be empowered to consult with the Division of Health on the official State Plan for the construction of additional hospital and health center facilities. The Director of Health will approve such applications for federal assistance in the construction of hospitals and health centers as may be considered advisable after consultation with the Advisory Council."

Section 4 of the act declares an emergency, as follows:

"Since the Division of Health of the Department of Public Health and Welfare is established by this Act as the official State Agency to receive Federal grants and aids, and since it is necessary to create a state Advisory Counsil to comply with enacted Federal legislation, an emergency is declared to exist under the provisions of the Constitution and this Act shall be in full force and effect from and after its passage and approval."

The act was approved on October 17, 1946, and became effective on that date.

The Federal legislation referred to in the emergency clause is the "Hospital Survey and Construction Act of 1946." (42 U. S. C. A., Section 291 to 291m.) The purposes of that act are set out as follows (42 U. S. C. A., Section 291):

"The purpose of this subchapter is to assist the several States --

- (a) to inventory their existing hospitals (as defined in section 291i (e) of this title), to survey the need for construction of hospitals, and to develop programs for construction of such public and other nonprofit hospitals as will, in conjunction with existing facilities, afford the necessary physical facilities for furnishing adequate hospital, clinic, and similar services to all their people; and
- (b) to construct public and other nonprofit hospitals in accordance with such programs."

Section 291a authorizes the appropriation of \$3,000,000 to carry out the purposes of Section 291(a).

Section 291b provides that a state application for funds for the purpose of carrying out the purposes of Section 291(a) must provide, among other things, for the designation of a State Advisory Council to consult with a designated state agency (in Missouri the Division of Health of the Department of Public Health and Welfare, Laws of 1945, page 972, Section 1).

Section 291c provides that, upon approval of a state's application, funds shall be allotted in order to carry out the purposes of Section 291(a).

Section 291d authorizes, for the fiscal year ending June 30, 1947, and each of the four succeeding fiscal years, the appropriation of \$75,000,000 to assist the states in carrying out the purposes of Section 291(b), supra.

Section 291f provides for the submission by a state of a plan for carrying out the purposes of Section 291(b). The plan is required to designate a single state agency as the agency for the administration of the plan, and is required

to "provide for the designation of a State advisory council which shall include representatives of nongovernment organizations or groups, and of State agencies, concerned with the operation, construction, or utilization of hospitals, including representatives of the consumers of hospital services selected from among persons familiar with the need for such services in urban or rural areas, to consult with the State agency in carrying out such plans."

Section 29lg provides for allotments of funds to states for which a state plan has been approved, and Section 29lh provides for approval of projects by the Surgeon General and allocation of funds therefor.

Section 291j provides for the withholding of certification by the Surgeon General whenever he finds that "the State agency is not complying substantially with the provisions required by section 291f (a)," which section contains the requirement of an Advisory Council in carrying out the state plan.

The obvious purpose of the Missouri Legislature in enacting the legislation referred to above was to enable the State of Missouri to participate in the federally assisted hospital construction program provided for by the Hospital Survey and Construction Act of 1946. That act, by its terms, shows that a program is contemplated of at least five year's duration, appropriations being authorized up to the fiscal year ending June 30, 1951 (42 U. S. C. A., Section 291d). In view of such fact, to construe the Missouri statute to mean that the Council appointed thereunder expired automatically at the end of the two year term would be contrary to the intent and purpose of the Legislature.

"It is fundamental that in the construction of statutes the courts should so interpret them as to conform with the intent of the lawmaking power that enacted them." (State ex inf. Williams, 222 Mo. 268, l.c. 283.) "Laws must be given a reasonable construction, keeping in view the purposes of, as well as the circumstances surrounding, their enactment." (Ibid., l.c. 284.)

The act in question made no express provision for the original members of the Council holding over until their successors were appointed and qualified. However, Section 12 of Article VII of the Constitution, 1945, provides that,

Dr. John W. Williams, Jr.

except as required by the Constitution, "all officers shall hold office for the term thereof, and until their successors are duly elected or appointed and qualified." Section 12820, R. S. Mo. 1939, contains a provision to the same effect. See also Langston v. Howard County, 336 Mo. 444, 79 S. W. (2d) 99.

CONCLUSION

Therefore, it is the opinion of this department that the members of the State Hospital Advisory Council appointed pursuant to Section 3, Laws of Missouri, 1945, page 972, continue to serve after the expiration of the two year term for which they were appointed and until their successors are appointed and qualified.

Respectfully submitted,

ROBERT R. WELBORN Assistant Attorney General

APPROVED:

J. E. TAYLOR Attorney General PARENT AND CHILD:

DIVORCE:

Parent failing to pay maintenance money for a minor child in accord with divorce decree is liable to prosecution under nonsupport statute.

February 28, 1949

3.4



Hon. Robert P. C. Wilson, III Prosecuting Attorney Platte County Platte City, Missouri

Dear Sir:

This is in reply to your request for an opinion, which reads as follows:

"In a divorce suit here the decree rendered awarded the sole care and custody of a child under the age of 16 years to the mother, and allowed the father only visitation rights. Is the father now liable to prosecution under the provisions of Section 4420, Laws Missouri 1947, if he, without good cause, fails, neglects or refuses to provide adequate food, clothing, lodging and medical and surgical attention for the child?"

Section 4420, Mo. R. S. A., also Laws of 1947, Volume I, page 374, reads as follows:

"If any man shall, without good cause, fail, neglect or refuse to provide adequate food, clothing, lodging, medical or surgical attention for such wife; or if any man or woman shall, without good cause, abandon or desert or shall without good cause fail, neglect or refuse to provide adequate food, clothing, lodging, medical or surgical attention for his or her child or children born in or out of wedlock, under the age of sixteen years, or if any other person having the legal care or custody of such minor child, shall

without good cause, fail, refuse or neglect to provide adequate food, clothing. lodging, medical or surgical attention for such child, whether or not, in either such case such child or children, by reason of such failure, neglect or refusal, shall actually suffer physical or material want or destitution; or if any man shall leave the State of Missouri, and shall take up his abode in some other state, and shall leave his wife, child or children, in the State of Missouri, and shall, without just cause or excuse, fail, neglect or refuse to provide said wife, child or children, with adequate food, clothing, lodging, medical or surgical attention, then such person shall be deemed guilty of a misdemeanor; and it shall be no defense to such charge that some person or organization other than the defendant has furnished food, clothing, lodging, medical or surgical attention for said wife, child or children and he or she shall, upon conviction, be punished by imprisonment in the county jail not more than one year, or by fine not exceeding one thousand dollars (\$1,000) or by both such fine and imprisonment. No other evidence shall be required to prove that such man was married to such wife than would be necessary to prove such fact in a civil action."

A certified copy of the decree rendered in the case shows that the mother was granted sole custody and care of the minor child and the father was ordered to pay the sum of \$25 per month for the care and support of the said minor child.

Section 4420, supra, makes provision for a conviction in violation thereof for either of two offenses, abandonment or failure to provide adequate food, clothing, lodging, medical or surgical attention for a minor child, under the age of sixteen years.

In the case of State v. Hartman, 259 S. W. 513, the court held that there was not an abandonment of the children since the legal custody of the children had been granted to the mother. However, the court held that, under the statute as it read as

amended by an act in 1921, there could be a separate offense because a parent fails to furnish food, clothing or lodging to his child even though he has not abandoned it.

The rule in Missouri is that when parents are divorced, and the divorce decree is silent as to the custody and maintenance of the child, the father's obligation is unchanged as to his minor child. Ash v. Modern Sand & Gravel Co., 122 S.W. (2d) 45, 48.

The general rule appears to be that which is discussed in 39 Am. Jur., under the heading of Parent and Child, Section 108, page 765, ff., to the effect that a father cannot ordinarily escape criminal liability for failing to support his child, on the ground that a decree of absolute divorce has severed his marital relations with his wife, since his obligation to his child is not altered by such a decree. Even where the decree of divorce requires the father to make payments for the support of his child in the custody of its mother, the weight of authority is to the effect that a father who fails to make such payments is not relieved by the decree from criminal or quasi-criminal responsibility for failure to support the child. Under the nonsupport statutes of some jurisdictions, a decree requiring the parent to make payments is not only no defense, but is regarded as establishing a legal duty of support for the entire or partial nonperformance of which he may incur criminal liability irrespective of whether he may be held criminally responsible on the theory that his pre-existing legal duty to support his child survives the decree. However, there is some authority to the effect that a divorced parent whose child has been taken from his custody should be relieved of responsibility where the decree requires him to pay certain sums for its maintenance. The reason advanced for such a rule is that the remedy for nonsupport lies in the divorce court which has, by the decree, assumed jurisdiction of the maintenance of the child. This theory apparently rests on the assumption that the sole purpose of a criminal proceeding against such a person is to coerce him to comply with an order which the divorce court has power to enforce.

In the case before us we have an instance where the parents have been divorced and the decree entered in the case has fixed the amount that the father should pay for the care and support of the minor child. In an annotation in 22 A. L. R., page 795, the rule is stated, followed by authorities, as follows:

"By the weight of authority, a father who is required by a decree of divorce to make periodical payments for the support of a child in the custody of its mother, and who fails to make such payments, is not relieved, by the decree of divorce, from criminal or quasi criminal responsibility for a failure to support the child. " " "

Thus, it appears that the weight of authority holds that a father may be criminally responsible for a failure to make payments provided for in the decree of divorce. We think this should be the rule in Missouri, inasmuch as our divorce courts do not have the power to punish by contempt for the nonpayment of alimony and maintenance money by virtue of the divorce decree alone. The Missouri view is that a judgment for such is a judgment for the payment of money and the failure to pay is no ground for imprisonment. In re Kinsolving, 116 S. W. 1068, 135 Mo. App. 631; McMakin v. McMakin, 68 Mo. App. 57; Francis v. Francis, 179 S. W. 975, 192 Mo. App. 710.

When the decree of divorce was entered, the court measured in money the ability of the father to contribute to the support of his minor child. We believe that a failure of the father to make these payments makes him liable for criminal prosecution under Section 4420, Mo. R. S. A. However, we believe that the payment of the amounts ordered in the divorce decree removes from further consideration the question of whether or not a father has neglected to provide adequate food, clothing, lodging and medical or surgical attention for a minor child. Said Section 4420 provides that the father must fail "without good cause" to provide adequate food, clothing, lodging, medical or surgical attention for the child. In State of Kansas v. Miller, 206 P. 744, 22 A. L. R. 788, the court indicated that the use of this same phraseology should have great bearing in the determination of criminal liability for violation of a nonsupport statute. The court reversed a criminal conviction because of the very persuasive significance that it attached to the defendant's prima facie lawful excuse, and stated that the ends of justice would be better served if the machinery of the criminal law had not been set in motion against the defendant until the civil aid of the court which originally granted the divorce had been invoked.

In order to convict a father for failure to support a minor child there must be evidence that the father possessed

the means for supporting the child. State v. Miller, 33 S.W. (2d) 1063; State v. Young, 273 S. W. 1106. Section 1519, R. S. Mo. 1939, reads as follows:

> "When a divorce shall be adjudged, the court shall make such order touching the alimony and maintenance of the wife, and the care, custody and maintenance of the children, or any of them, as, from the circumstances of the parties and the nature of the case, shall be reasonable, and when the wife is plaintiff, may order the defendant to give security for such alimony and maintenance; and upon his neglect to give the security required of him. or upon default of himself and his sureties, if any there be, to pay or provide such alimony and maintenance, may award an execution for the collection thereof, or enforce the performance of the judgment or order by sequestration of property, or by such other lawful ways and means as is according to the practice of the court. The court, on the application of either party, may make such alteration, from time to time. as to the allowance of alimony and maintenance, as may be proper, and the court may decree alimony pending the suit for divorce in all cases where the same would be just, whether the wife be plaintiff or defendant, and enforce such order in the manner provided by law in other cases."

Under the provisions of Section 1519, supra, it must be assumed that the court took into consideration the father's ability to support and determined that the amount provided for in the divorce decree was proper, in view of the circumstances of the parties and the nature of the case. In the event of changed circumstances, the court may make such alteration as to the allowance as may be proper. Thus, we see that the court may order adequate support for children of divorced parents in the divorce decree itself. A father complying with such orders should not remain subject to the criminal proceedings outlined in Section 4420, supra.

Hon. Robert P. C. Wilson, III -6-

Conclusion.

Therefore, it is the opinion of this department that a father who neglects to pay maintenance money for the care and support of a minor child, when a decree of divorce provides for such payment, is liable to prosecution under the nonsupport statute of the laws of Missouri. However, we believe that such payment satisfies the requirements of the nonsupport statute.

Respectfully submitted,

JOHN R. BATY Assistant Attorney General

APPROVED:

J. E. TAYLOR Attorney General

JRB:ml

PROBATE JUDGE: MAGISTRATE: OFFICERS:

Probate judge and ex officio magistration may not be a member of a county library board.

May 10, 1949

5-11

FILED 97

Hon. Homer F. Williams Prosecuting Attorney Bollinger County Marble Hill, Missouri

Dear Sir:

This is in reply to your request for an opinion, which reads as follows:

"Can the Probate Judge and ex-officio Magistrate also legally serve on the board of trustees of a County Library established under Section 14768, Chap. 110, Art. 6, R.S. Mo. 1939?"

There is no constitutional or statutory prohibition in the state of Missouri prohibiting the holding of two offices by the same person. The general rule concerning this question is to be found in 46 C. J., page 941, which reads as follows:

> "At common law the holding of one office does not of itself disqualify the incumbent from holding another office at the same time, provided there is no inconsistency in the functions of the two offices in question. But where the functions of two offices are inconsistent, they are regarded as incompatible. The inconsistency, which at common law makes offices incompatible, does not consist in the physical impossibility to discharge the duties of both offices, but lies rather in a conflict of interest, as where one is subordinate to the other and subject in some degree to the supervisory power of its incumbent, or where the incumbent of one of the

offices has the power to remove the incumbent of the other or to audit the accounts of the other."

In an opinion to Hon. V. C. Rose, Circuit Judge, Unionville, Missouri, under date of April 13, 1939, this office held that the office of circuit judge and that of school director are incompatible, and that sound public policy and the adjudged cases make inappropriate the holding of both of said offices at the same time by the same individual. In part, the reasoning leading to that conclusion was that the actions of the circuit judge as a member of the school board might be influenced by the fact that if a controversy arose as to the validity of such action it would be determined by that same person sitting as circuit judge. The opinion recognized that the circuit judge would usually disqualify himself in such a proceeding, but nevertheless applied the test of incompatibility or inconsistency of duties; that there might be a conflict of interest, and as circuit judge the individual would have some supervisory power over the same individual as a member of the school board.

Section 14769, R. S. Mo. 1939, reads as follows:

_county library district' as such body corporate, by and through said county library board, shall have power to sue and be sued, to complain and defend, and to make and use a common seal, to purchase or lease grounds, to lease, occupy or to erect an appropriate building or buildings for the use of said county library and branches thereof, and to sell and convey real estate and personal property for and on behalf of the county library and branches thereof, to receive gifts of real and personal property for the use and benefit of such county library and branch libraries thereof, the same when accepted to be held and controlled by such board, according to the terms of the deed, gift, devise or bequest of such property.

Laws of Missouri, 1945, page 770, provides for jurisdiction of magistrates as follows:

"Each magistrate shall have jurisdiction coextensive with his county and the magistrates may organize into a court or courts with divisions.

"Except as otherwise provided by law, magistrates shall have original jurisdiction of all civil actions and proceedings for the recovery of money, whether such action be founded upon contract or tort, or upon a bond or undertaking given in pursuance of law in any civil action or proceeding, or for a penalty or forfeiture given by any statute of this state, when the sum demanded, exclusive of interest and costs, does not exceed five hundred dollars in counties which now have or may hereafter have not more than 70,000 inhabitants, seven hundred and fifty dollars in counties which now have or may hereafter have more than 70,000 and less than 100,000 inhabitants, one thousand dollars in counties which now have or may hereafter have 100,000 or more inhabitants. Magistrates shall have jurisdiction of all actions against any railroad company in this state, to recover damages for killing or injuring horses, mules, cattle or other animals within their respective counties, without regard to the value of such animals, or the amount claimed for killing or injuring the same. Provided. such magistrates shall have exclusive original jurisdiction in all such cases where the amount involved is less than fifty dollars." .

Laws of Missouri, 1945, page 804, provides for jurisdiction of probate courts as follows:

"Said court shall have jurisdiction over all matters pertaining to probate business, to granting letters testamentary and of administration, the appointment of guardians and curators of minors and persons of unsound mind, settling the accounts of executors, administrators, curators and guardians, and the sale or leasing of lands by administrators, curators and guardians."

Taking into consideration the above-named sections, it is apparent that cases may arise where the library district might sue or be sued in any one of a number of possible situations. If the sum in question was of a small enough amount, jurisdiction of the case might be in the magistrate court. Again, Section 14769, supra, provides that the library district may receive gifts of real and personal property. If these gifts were made in the form of devises or bequests, the jurisdiction of the magistrate court would be invoked in the administration of the estate. In that instance the probate judge might be influenced by virtue of his being a member of the county library board. We recognize that by statute a judge of probate is prohibited from sitting in a case in which he is interested (Laws 1945, p. 763). However, the incompability exists nevertheless, and the interests are in conflict.

We note in passing Article II of the Constitution of 1945 that it provides as follows:

"The powers of government shall be divided into three distinct departments - the legis-lative, executive and judicial - each of which shall be confided to a separate magistracy, and no person, or collection of persons, charged with the exercise of powers properly belonging to one of those departments, shall exercise any power properly belonging to either of the others, except in the instances in this Constitution expressly directed or permitted."

In People v. Sanderson, 30 Cal. 160, the California Supreme Court was interpreting that section in a case wherein the chief justice of the Supreme Court was by law made a trustee of the state library. In the course of the opinion the court said, 1.c. 167:

"It is very certain that the duties of Trustee of the State Library are not judicial, as may be seen by reference to the Act. They properly fall within the sphere of the executive department of the Government.

"This provision of the Constitution, so far as it relates to the judicial department of the State, is, in our judgment, eminently wise. One of its objects seems to have been to confine Judges to the performance of judicial duties; and another to secure them from entangling alliances with matters concerning which they may be called upon to sit in judgment; and another still to save them from the temptation to use their vantage ground of position and influence to gain for themselves positions and places from which judicial propriety should of itself induce them to refrain. * * *"

Conclusion.

Therefore, it is the opinion of this department that the office of probate judge and ex officio magistrate and that of member of a county library board are incompatible, and that sound public policy makes inappropriate the holding of both of said offices at the same time by the same individual.

Respectfully submitted,

JOHN R. BATY Assistant Attorney General

APPROVED:

J. E. TAYLOR Attorney General

JRB:ml

Local deputy commissioner of the motor vehicle PUBLIC OFFICERS: registration department may be appointed deputy sheriff. May 31, 1949 Mr. Homer F. Williams Prosecuting Attorney Bollinger County Marble Hill, Missouri Dear Mr. Williams: This will acknowledge receipt of your request for an official opinion of this department, which letter reads as follows: "I would like your opinion as to whether a deputy employee of the Motor Vehicle Registration Department, that is our Local man who has charge of the issuance of Licenses for Automobiles in this county, can also be a Deputy Sheriff in the county?" There is no constitutional or statutory prohibition against the appointment of an individual as deputy sheriff in a certain county, which individual is at the same time the deputy commissioner of the motor vehicle registration department in that county. There is however the common law rule that a person may not hold at the same time two public offices which are incompatible and inconsistent. In such cases, acceptance of the second incompatible office operates as a resignation of the first. However, this rule is inoperative where one of the alleged public offices is in reality a mere employment. That a deputy sheriff is a public officer has long been established; see State ex rel. Walker v. Bus, 135 Mo. 325, 36 S.W. 636. The question of whether or not a deputy commissioner of the motor vehicle registration department is a public officer has never been before the courts. However, assuming that a deputy commissioner of the motor vehicle registration department is a public officer, there would still be no incompatibility between such office and that of deputy sheriff. The common law principle of incompatible public offices was stated in State ex rel. Walker v. Bus, supra, at 1.c. 338: "# # #At common law the only limit to the number

of offices one person might hold was that they should be compatible and consistent. The incompatibility does not consist in a physical inability of one person to discharge the duties of the two offices, but there must be some inconsistency in the functions of the two; some conflict in the duties required of the officers, as where one has some supervision of the other, is required to deal with control, or assist him."

The duties of the local deputy commissioner of the motor vehicle registration department are limited and are ministerial in character. These duties consist of the issuance of motor vehicle license plates, collection of motor vehicle registration fees; issuance of driver's license applications and collection of fees therefor, etc. No instance can be conceived where he would be required to exercise any supervision over or assist the office of deputy sheriff.

Nor would the office of deputy sheriff come in conflict with that of deputy commissioner. The only time any inconsistency would arise would be where the deputy sheriff would be required to serve process on the deputy commissioner of the motor vehicle registration department as such. This has been held, in State ex rel Walker v. Bus, supra, to be too remote a contingency to make the offices of deputy sheriff and school director incompatible. The court, at 1.c. 339, ruled that:

"We are unable to discover the least incompatibility or inconsistency in the public functions of these two offices, or where they could by possibility come in conflict or antagonism, unless the deputy sheriff should be required to serve process upon a director as such. We do not think such a remote contingency sufficient to create an incompatibility. The functions of the two offices should be inherently inconsistent and repugnant. State ex rel. v. Goff, 15 R.I. 507."

We are, therefore, of the opinion that even if a deputy commissioner of the motor vehicle registration department is a public officer and not a more employee, this office would not be inconsistent and incompatible with that of deputy sheriff.

CONCLUSION

It is therefore the opinion of this department that the local deputy commissioner of the motor vehicle registration department in a certain county may also be appointed as deputy sheriff of that county. Acceptance of such appointment would not operate as a resignation as deputy commissioner.

Respectfully submitted,

RICHARD H. VOSS Assistant Attorney General

APPROVED:

J. E. TAYLOR Attorney General

RHV:mw

CRIMINAL LAW
SUPPORT OF MINOR CHILD
VENUE
JURISDICTION
CHILD SUPPORT

The venue and jurisdiction of a prosecution under Sect. 4420, Laws of 1947, Vol. I, p. 259, lies in the county in which the minor child is residing at the time the father fails to support and maintain said child.

June 27, 1949

Honorable Homer F. Williams Prosecuting Attorney Bollinger County Marble Hill, Missouri



Dear Sir:

We are in receipt of your letter of June 4th, 1949, in which you request an opinion of this Department as follows:

"I am somewhat puzzled as to the venue of cases which arise under Section 4420 of the Revised Statutes of Missouri, as amended, under the Laws of 1947, and particularly as to failure to support minor child, which is the particular portion of the section that relates to the cases which have my attention.

"In the one case, A, the wife was married to her husband B, in St. Louis, and they lived there for several years and have one child about 7 yrs. of age; later A. obtained a divorce from B. in St. Louis, Missouri, and also judgment for support for the child in a certain sum. A few months ago, she moved to this county, where she has remarried and now lives; her former husband B, has paid her very little on her award for support of child, and our Welfare Office thinks that he, (B) could be prosecuted in this county now, for failure to support this child, since she now lives here in this county. Would the court here, in your opinion have jurisdiction of the offense if the facts otherwise would warrant the prosecution?

"In the other case, A. the wife, marries B. the husband in another county, where they lived until they separated about 6 months ago, B. having never lived in this county? When they separated A. came back here to live with her parents. A. and B. are not divorced, but B. has

not been supporting their child, although he has promised to do so on occasions. Does the court here have jurisdiction of the offense, if there is an offence?

"Am not clear as to the jurisdiction and have not found any case passing specifically on this question."

From the above request, we gather that you are interested in the question of prosecution for the support of minor children, and we will therefore restrict the scope of this opinion to that issue.

The primary distinction, between the two sets of facts which you set out in your letter, is that in one case the wife has been divorced from her husband and in the other case the parties are still married. In both situations the failure to provide for the minor child or children is taking place as of the present time in your county. The fact that the mother is divorced from the father does not alter the duty of the father to provide the support for the children, and, therefore, the set of facts in which there is a divorce is on the same footing as the second case which you mention. (State v. Hartman, 259 S.W. 514 (Mo. App. 1924)). The basic question, therefore, presented by these two situations is whether the criminal prosecution under Section 4420, as amended in 1947, can be maintained in the county in which the mother and child are living, but the father is not present in the county and the marriage took place and the parties lived outside the county at some prior date.

Section 4420, Laws of 1947, Vol. I, page 259, reads as follows:

"If any man shall, without good cause, fail, neglect or refuse to provide adequate food, clothing, lodging, medical or surgical attention for such wife; or if any man or woman shall, without good cause abandon or desert or shall without good cause fail, neglect or refuse to provide adequate food, clothing, lodging, medical or surgical attention for his or her child or children born in or out of wedlock, under the age of sixteen years, or if any other person having the legal care or custody of such minor child, shall without good cause, fail, refuse or neglect to provide adequate food, clothing, lodging, medical or surgical attention for such child, whether or not, in either such case such child or children, by reason of such failure, neglect or refusal, shall actually suffer physical or material want or destitution; or if any man shall leave the State of Missouri and shall take up his abode in

some other state, and shall leave his wife, child or children, in the State of Missouri, and shall, without just cause or excuse, fail, neglect or refuse to provide said wife, child or children, with adequate food, clothing, lodging, medical or surgical attention, then such person shall be deemed guilty of a misdemeanor; and it shall be no defense to such charge that some person or organization other than the defendant has furnished food, clothing, lodging, medical or surgical attention for said wife, child or children and he or she shall, upon conviction, be punished by imprisonment in the county jail not more than one year, or by fine not exceeding one thousand dollars (\$1,000) or by both such fine or imprisonment. No other evidence shall be required to prove that such man was married to such wife than would be necessary to prove such fact in a civil action."

There was a section of the statutes which provided for the crime described in the 1947 law long before that date. In 1947, it was amended to make it possible to prosecute under the section regardless of whether the child was receiving attention and necessities from some other source than the father. A court decision on venue with regard to such prosecution would not, therefore, be altered in its effect and influence by the amendment of 1947. The portion of Section 4420 providing for adequate care of a man's child or children is in the same language as the former Section 4420, R. S. Missouri, Under the latter section, the case of State v. Winterbauer, 318 Mo. 693, 300 S.W. 1071 (1927), was decided. In that case the defendant was prosecuted in Oregon County, Missouri, under Section 4420 for failure to support an infant child. The marriage of the defendant and the mother of the child occurred in Illinois. lived together four or five days, and she removed to Oregon County, where she lived between the time she left Illinois and the time of the suit. In that case, the court said at 1. c. 697:

"The defendant never lived in Oregon County and it was contended that the circuit court of that county was without jurisdiction of the offense charged. The defendant voluntarily sent his wife to live with her father in Oregon County. His duty to support and provide for her and his child when born followed them wherever he sent them. In State v. Hobbs, 291 S. W. 184, a similar prosecution, based on this statute, the mother of the infant child found it necessary to remove to Cape Girardeau County where she resided with her children

for three years. It was contended that the venue was in Stoddard County where the defendant, the father, lived with his second family. The court said:

"'In the instant case, we think, the venue may be properly laid in Cape Girardeau County where the children were residing, and where, it is alleged, they were being neglected by the father in the necessities of life. It was there they were receiving no such contribution as the law requires the parent to furnish them. Of course, if the offense alleged were for abandonment, a different situation would be presented, as abandonment generally, if not always, occurs at one definite place.'

"The Springfield Court of Appeals cites many cases supporting this view. We think the venue was properly laid in Oregon County."

The above quotation points out clearly that the statute is directed (so far as we are here concerned) at the prevention of the failure of a father to support a minor child or children. He is to do this wherever the child is. It is thus clear, and the court points out, that the crime under Section 4420 occurs in the county in which the father fails to render this support. Since the child is living in a certain county, the failure to provide is a failure to provide in that country.

If you are interested in the same venue question with regard to the portion of the statute which deals with the abandonment of the wife, we think the above quoted language of the case sheds considerable light on that also.

CONCLUSION

We are therefore of the opinion that venue and jurisdiction to prosecute a man for failure to support his minor child or children lies in Bollinger County under the two sets of facts which you set out in your letter of June, 1949, and which we have quoted above.

Respectfully submitted,

SMITH N. CROWE, JR. Assistant Attorney General

APPROVED:

J. E. TAYLOR Attorney General

FEES CRIMINAL LAW

MAGISTRATE COURTS) No fee allowed magistrate court for issuance) of a search warrant where no criminal proceed-) ing against an individual is instituted.

August 9, 1949

Honorable Bryan A. Williams Probate Judge and Ex-Officio Magistrate Bollinger County Marble Hill, Missouri

Dear Sir:

We acknowledge your request for an opinion of this office submitting the following question:

> "If upon recovery of goods by search warrant, alleged to have been stolen, and there is no criminal proceeding instituted; what fee or fees if any would accrue to the Magistrate Court?"

The issuance of a search warrant to recover property is a process of a criminal nature inasmuch as it is never issued in connection with civil cases, but rather is issued in connection with or ancillary to criminal cases.

In an opinion submitted by this office to the Honorable Forrest Smith, under date of June 20, 1947, we concluded that in criminal proceedings in the magistrate court, the only fee accruing for the services of the magistrate or the clerk is the \$2.50 fee provided for in Senate Bill No. 108, enacted by the Sixty-Fourth General Assembly, Section 13403.1, R.S.A. We enclose a copy of this opinion with the statute set out therein.

In your request you state that after recovery of the property by search warrant, there was no criminal proceeding subsequently instituted. By this we take it that no criminal action was instituted against any individual. Consequently, if any fee would accrue to the magistrate court in the situation you have presented, we believe it would have to be the \$2.50 fee hereinbefore referred to. The allowance and collection of this fee, by the language of the statute, is dependent upon the institution of a criminal proceeding. Therefore, we apprehend the basic question for our determination to be whether or not the making of a complaint and issuance of a warrant is a "criminal proceeding" within the meaning of the statute.

In this connection let us refer to certain statutes relating to search warrants to determine their nature and purpose.

Section 4159, R. S. Missouri, 1939, provides:

"Upon complaint being made, on oath, in writing, to any officer authorized to issue process for the apprehension of offenders, that any personal property has been stolen or embezzled, and that the complainant suspects that such property is concealed in any particular house or place, if such magistrate shall be satisfied that there is reasonable ground for such suspicion, he shall issue a warrant to search for such property."

Section 4160, R. S. Missouri, 1939, provides:

"Such warrant shall be directed to the sheriff of the county, or to any constable of the township, and shall command him to search the place where such property is suspected to be concealed, in the daytime, which place shall be designated and the property particularly described in such warrant, and to bring such property before the magistrate issuing the warrant."

A reading of the above quoted sections relating to the issuance of a search warrant, we believe, indicates its purpose to be for the discovery, recovery and delivery, before the magistrate issuing the warrant, property stolen or embezzled. The issuance of the search warrant alone does not of itself constitute the bringing of any criminal action or proceeding against an individual.

In the case of Boeger v. Langenberg, 11 S.W. 223, 97 Mo. 390, the Supreme Court of Missouri in defining the functions of a search warrant said at Missouri 1.c. 396:

" * * * The function of such a warrant is to cause a search to be made by an officer at a particular place for personal property stolen or embezzled and to secure the production of the property, if found, before the magistrate. * * *" In Volume 56, C. J., the following is said regarding the nature and purpose of a search warrant, at pages 1184-1185, Sections 71-72:

"A search warrant is a legal process * * in the nature of criminal process. and has been likened to a writ of discovery. It is, indeed, a special and peculiar remedy, drastic in its nature, and made necessary because of public It is restricted to cases necessity. of public prosecutions, and it has no relation to civil processes or civil trials; hence the common law never recognized it as being available to individuals in civil proceedings or as a process for adjudicating civil rights or maintaining mere private rights. It is a police weapon, issued under the police power, and is a valid exercise thereof. * * *

"While the primary purpose of the search warrant is to aid in the detection and suppression of crime and to obtain evidence for use in criminal prosecutions, yet it cannot be used solely as a means to secure such evidence, and general exploratory searches and seizures, with or without a warrant, can never be justified. * * * Another function of a search warrant is the restoration to the owner of his property. Search warrant proceedings are not proceedings against a person, but are solely for the discovery and to get possession of personal property, and it is not their purpose to try title of, or right to the possession of, goods, nor to try the person in whose possession the goods, upon search, are found.

(Emphasis ours.)

We have also undertaken to determine what the courts have generally considered to be a "criminal proceeding." In the case of

Gibson v. Sacramento County, 174 Pac. 935, 37 Calif. App. 523, it was said at Pac. 1.c. 936:

"* * * A 'criminal proceeding' means some authorized step taken before a judicial tribunal against some person or persons charged with the violation of some provision of the criminal law. * * *"

The above rule was also declared in similar language in the case of McGoldrick v. Downs, 53 N. Y. Supp. (2d) 333, 184 Misc. 168.

In the case of Post v. United States, 16 S. Ct. 611, 161 U.S. 583, the United States Supreme Court, in holding that the submission of a bill of indictment by the Government attorney to the grand jury was not the institution of a criminal proceeding, said at U.S. 1.c. 587:

"Criminal proceedings cannot be said to be brought or instituted until a formal charge is openly made against the accused, either by indictment presented or information filed in court, or, at the least, by complaint before a magistrate. * * *"

In the exposition of a statute it is of ultimate importance that the true intent and meaning of the lawmaking authority be ascertained as expressed in the language of the statute, and this intent is to be taken according to what is consonant with reason and good discretion. (State v. Schwartzmann Service Inc., 40 S.W. (2d) 479, paragraphs 1 and 3.) In interpreting Section 13403.1, R.S.A., supra, which provides for the fee allowed the magistrate court in criminal proceedings, in accordance with the true intent and meaning of the legislature which enacted the statute, we believe it was contemplated that a criminal proceeding in a sense that some formal charge be lodged against a person or persons in the magistrate court is first required before the fee can be allowed.

CONCLUSION

It is therefore our opinion that upon recovery of property allegedly stolen, by a search warrant issued by the magistrate court,

and thereafter no criminal proceeding or charge is brought against an individual for a violation of our criminal laws that no fee would accrue to said court for the complaint and issuance of a search warrant thereon, is not of itself the bringing of a criminal proceeding in the court for which the statutory fee would be allowed.

Respectfully submitted,

RICHARD F. THOMPSON Assistant Attorney General

APPROVED:

J. E. TAYLOR Attorney General PROSECUTING ATTORNEYS:

DUTIES:

Not duty of Prosecuting Attorney to adivse or represent special road districts in his county.

August 23, 1949

Honorable Robert P. C. Wilson, III Prosecuting Attorney Platte County Platte City, Missouri FILED 97

Dear Sir:

This is to acknowledge receipt of your letter of recent date requesting a legal opinion of this department, and reads as follows:

"We have several Special Road Districts in Platte County, Missouri, and these organizations have on several occasions requested advice and representation. I understand full well that it is my duty to advise the County Court when requested to do so. If I also advise the Special Road Districts as a part of my duty as Prosecuting Attorney, it is not unlikely that conflicts of interest may develop.

"Respectfully request the opinion of your department as to whether it is my duty to advise and represent Special Road Districts in this County, or whether these districts should employ other counsel in their difficulties."

It appears that the inquiry you have made concerning the duties of the prosecuting attorney may be summarized as follows: Whether or not it is your official duty as prosecuting attorney to give legal advice to, and to represent the various special road districts in your county in civil matters.

Section 12944 R. S. Mo., 1939, outlines the general duties of the prosecuting attorney regarding civil matters and reads as follows:

"He shall prosecute or defend, as the case may require, all civil suits in which the county is interested, represent generally the county in all matters of law, investigate all claims against the county,

draw all contracts relating to the business of the county, and shall give his opinion, without fee, in matters of law in which the county is interested, and in writing when demanded, to the county court, or any judge thereof, except in counties in which there may be a county counselor. He shall also attend and prosecute, on behalf of the state, all cases before justices of the peace, when the state is made a party thereto: Provided, county courts of any county in this state owning swamp or overflowed lands may employ special counsel or attorneys to represent said county or counties in prosecuting or defending any suit or suits by or against said county or counties for the recovery or preservation of any or all of said swamp or overflowed lands, and quieting the title of the said county or counties thereto, and to pay such special counsel or attorneys reasonable compensation for their services, to be paid out of any funds arising from the sale of said swamp or overflowed lands, or out of the general revenue fund of said county or counties."

Section 12947, R.S. Mo., 1939, provides that it shall be the duty of the prosecuting attorney to give his opinion on any matter of law to the officers mentioned in the section, free of charge, upon request, said section reads as follows:

"The prosecuting attorney shall, without fee, give his opinion to any justice of the peace, and to any county court, or to any judge thereof, if required, on any question of law in any criminal case, or other case in which the state or county is concerned, pending before such court or officer."

Under the provisions of section 12944, supra, it is the duty of the prosecuting attorney to prosecute or defend all civil suits in which the county is interested, and to represent the county generally in all matters of law. He is required to investigate all claims against the county and draw all contracts

relating to the county business. Upon request, and without fee, he is to give his opinion on matters of law relating to the county business, to the county court or any judge thereof, except in those counties where such duties are performed by a county counselor. He is further required to attend and prosecute on behalf of the state all cases pending before a justice of the peace, when the state is made a party thereto. In regard to the last mentioned duty it is noted that the term "justice of the peace," or "justice of the peace court" is now obsolete and that since the Constitution of 1945, and also Acts of the Legislature of that year, magistrate courts have been created to replace the justice of peace courts existing under the former law. That under the provisions of Section 1, page 1079, Laws of 1945, whenever the word "justice and justice of the peace" appear in any statute such words shall hereafter be deemed to include and refer to "magistrate," unless something in the subject or context be repugnant to such construction. Substituting the word "magistrate" for that of "justice" in said Section 12944, we find that it becomes the duty of the prosecuting attorney to attend and prosecute on behalf of the state all cases pending before the magistrate when the state is made a party thereto.

Under the provisions of Section 12947, supra, the prosecuting attorney shall upon request give his written opinion to the county court or any judge thereof on any question of law, or to any magistrate judge regarding any questions of law that arise in any proceeding before such magistrate, in which the county or state is interested. We believe this section of law is self-explanatory and we will not discuss it except to say that in our opinion this section cannot be interpreted to mean that the prosecuting attorney is required to give his opinion to any special road district even though requested so to do nor is he required to represent such district in any proceeding before a magistrate court in his county.

This section makes it the duty of the prosecuting attorney to advise the county court on all matters of law in which the county is interested. It is also his duty to represent the county generally whether such matters originate in or out of court, but we are unable to find anything in this section requiring him to represent the various special road districts of his county. It does not follow that the interests

of any such districts would constitute county business, or matters in which the county as a whole would be interested within the meaning of the statute. In making this law the legislature might have made it the duty of the prosecuting attorney to advise and represent such districts in his county, but since these duties have not been written into this section, we are of the opinion that the prosecuting attorney is under no obligation and that the giving of advice or his representation of such special road districts is no part of his official duties. We believe that our contention that the prosecuting attorney is not required to advise or represent any of the special road districts of his county is upheld by the ruling in the case of State ex rel Wammack and Welborn v. Affolder, 257 S.W. 493, 214 Mo. App. 500.

In this case the county court had employed the attorneys for the plaintiff to perform certain legal services in connection with a bond issue in Duck Township in said county. The county treasurer refused to honor the warrant given the attorneys in payment for their services to the township on the ground that it was the duty of the prosecuting attorney of that county to advise or represent the township in its legal matters, and that such duties were enjoined on the prosecuting attorney by law.

While the court in its opinion dealt with those statutes relating to the duties of the prosecuting attorney, and was chiefly concerned with the proposition as to whether it was the prosecuting attorney's duty to represent the township under above-mentioned facts it also passed upon the proposition as to whether or not it was the prosecuting attorney's duty to represent the special road district of his county. It is interesting to note that the court held that it was not the prosecuting attorney's duty to represent or advise the township in question and also that it was not his duty to advise or represent the special road district of his county. Said opinion reads as follows:

"Was it the duty of the prosecuting attorney to render the services which plaintiffs rendered? Sections 736 and 738 prescribe generally the duties of the prosecuting attorney. There is nothing in these sections which may be said to place upon the prosecuting attorney the duty of looking after this bond issue. There are other sections prescribing duties in particular cases, but the sections, supra, cover the field generally.

The bond issue of Duck Creek township was not a matter of county wide concern. It was a matter that affected that township only. The Act of 1917 provided that in a township bond issue thereunder the county court shall act for the township. The only recognition of township organization is that the act provides in section 10750 that the proceeds of the bond sale be turned over 'to the treasurer of the district or the county or township, as the case may be. In the reference quoted, and in section 10748, it will be seen that, not only was township organization taken into account, but also special road districts organized under sections 10800 et seq. and sections 10833 et seq. R.S. 1919. Neither the act of 19017, nor the Special Road District Acts, makes it the duty of the prosecuting attorney to advise or render service. There is nothing in the Township Organization Act (section 13164 et seq., R.S. 1919) which makes it the duty of the prosecuting attorney to render the service rendered here by plaintiffs. * * *"

257 S.W., 1.c. 494-495

CONCLUSION

It is therefore the opinion of this department that it is the duty of the prosecuting attorney to advise the county court or any of the judges thereof on any matters of law pertaining to the county's business, and that he shall also advise the judges of the magistrate courts in his county in all matters pending therein in which the county or state is interested, and to give his written opinion without fee when requested by said officials. It is the further duty of the prosecuting attorney to represent the county generally, in all matters in which the county is interested, and to attend and represent the state in all cases pending before magistrate courts in his county in which the state is made a party.

It is the further opinion of this department that it is not the duty of the prosecuting attorney to give advice or to represent any of the various special road districts of his county.

Respectfully submitted,

PAUL N. CHITWOOD, Assistant Attorney General

APPROVED:

J. E. TAYLOR ATTORNEY GENERAL

PMC:nm

GAMBLING: The operation of a "bingo game" is a violation of the

BINGO: laws of this state.

KENO:

August 27, 1949



Honorable Homer F. Williams Prosecuting Attorney Bollinger County Marble Hill, Missouri

Dear Sir:

This is in answer to your letter of recent date requesting an official opinion of this department and reading as follows:

"Is it a violation of the law for the American Legion, or for any other organization or association to conduct the game of bingo at their picnics? This game of bingo is played by a number of players seated at a stand, where they each have a bingo card and grains of corn with which they play. They each pay five cents to participate in the game, and there is an announcer who calls certain numbers under a certain letter and if that number appears on the participants bingo card, he puts a grain of corn on this space in his card, and thereafter the game continues until some one having filled in their card so that they have one continuous line up and down or across their card, calls "Bingo", and are awarded a card thereon, which, with other cards which they might similarly obtain, are good for certain presents which are exhibited about the Stands?"

Section 4675, R. S. Mo. 1939, provides that any person who sets up or keeps certain gambling devices or games in this state shall be guilty of a graded felony. One of the gambling games so denounced is that of "keno." The game which you describe in your opinion request is precisely the game that is know as "keno." Trimble vs. The State, 27 Ark. 355, Overby vs. State, 18 Fla. 178, Portis vs. State, 27 Ark. 360, Miller vs. State, 48 Ala. 122, Brown vs. State, 40 Ga. 689, Boasberg vs. State, 60 Fed. (2d) 185.

Since the game you have described is the game known as "keno," the mere fact that it is designated by the person who is setting up and operating such game as "bingo" does not in any way prevent the violation of Section 4675. So long as the actual game played is "keno," a violation of the statute exists.

CONCLUSION

It is the opinion of this department that the game described in your opinion request is "keno" and that any person who sets up, keeps or operates such a game may be prosecuted under provisions of Section 4675, R. S. Mo. 1939, which makes such setting up, keeping or operating a keno game a graded felony.

Respectfully submitted,

C. B. BURNS, JR. Assistant Attorney General

APPROVED:

J. E. TAYLOR Attorney General

CBB: VLM

Prisoner given jail liberties by ESCAPE FROM COUNTY JAIL sheriff or jailer who leaves without legal authority is guilty of escape. 10/27/49 October 13, 1949 Hon. Homer Williams Prosecuting Attorney Bollinger County Marble Hill, Missouri Dear Mr. Williams: Your letter of recent date requesting an opinion of this department reads as follows: "A few days ago our jailer, who is also the sheriff of the county, had in jail a prisoner, who was serving out a sentence in jail given him by a jury and pronounced by the court on a charge of

operating a motor vehicle while intoxicated.

"At times the sheriff permitted him to remain outside the jail, mostly while in company with the sheriff, and on this particular occasion, while he was playing with the sheriffs children, and while the sheriff had walked away to another part of the town, the prisoner just walked off, but just a few days later, was retaken at his home, and is now back in jail serving on his original term which was a one year term.

"Is he guilty of breaking jail or custody under the provisions of Section 4309 or is he guilty of any offense under any other section for leaving?

"Thanking you for your opinion in this matter as I have found no Missouri case directly in point."

Referring to Section 4309, R. S. Mo. 1939, which reads:

"If any person confined in any county jail upon conviction for any criminal offense, or held in custody going to such jail, shall break such prison or custody, and escape therefrom, he shall, upon conviction, be punished by imprisonment in the penitentiary not exceeding three years, or in a county jail not less than six months, to commence at the expiration of the original term of imprisonment."

specifically provides two conditions, breaking prison or custody and escaping therefrom.

Notice should be taken of Section 4306, R. S. Mo. 1939, which reads as follows:

"If any person confined in the penitentiary for any term less than life, or in lawful custody going to the penitentiary, shall break such prison or custody and escape therefrom, he shall, upon conviction, be punished by imprisonment in the penitentiary for a term not exceeding five years, to commence at the expiration of the original term of imprisonment."

Comparing the two sections it will be noticed that the only difference between these two is that one refers to the penitentiary while the other refers to the county jail.

In our search for an interpretation of Section 4309, supra, we are unable to find wherein the Supreme Court of our state has placed an interpretation upon this section but we do find where they have interpreted Section 4306, supra, and which provides an analogous situation. In interpretating Section 4306, supra, the Supreme Court held in the case of Ex parte Rody, 152 SW (2d) 657, l.c. 659, in the following quotation that a convict confined in a penitentiary escaping while outside under guard was at beast constructively confined in the penitentiary, as stated in the following quotation:

"We are unable to agree that State v. Betterton, supra, and Ex parte Carney, supra, support petitioner's first contention. On the contrary, the Betterton decision is against him. The concluding lines of the opinion held Sec. 4307 (then Sec. 3161, R.S. 1919) did apply to a prisoner escaping from a prison farm, and there is no difference in principle between escaping from a prison farm and a prison sawmill. Sec. 4307 is grouped with two other statutes, Sec. 4306 and Sec. 4308, all opening with the same

clause and containing the same phrase 'confined in the penitentiary.' Sec. 4306 applies to convicts in lawful custody going to the penitentiary, and to those who break the prison walls and escape after they are in. Sec. 4307, supra, specially applies to convicts who escape from the custody of the officers while out under guard (the section invoked by the Warden in this case). And Sec. 4308 deals with convicts who escape from within the prison 'without breaking such prison.' That was the section upon which the information in the Betterton case was based, for escaping from a prison farm. But, as already stated, the decision held the prosecution should have been under Sec. 4307.

"These three sections and Sec. 9086, supra, are in pari materia and should be construed together. There can be no question about the fact, we think, that under their provisions any convict held in custody under a commitment for the service of a penitentiary sentence is at least constructively 'confined in the penitentiary,' whether he be going to the penitentiary, or in the penitentiary, or outside under guard. * * *"

In Volume 50, C. J. Section 56, p. 351, the writers thereof state that: "There is a negligent escape when a prisoner has gone out of sight and control of the officer in whose custody he was, without the knowledge or consent of such officer, but by reason of his careless or negligent conduct."

Section 57 of the same Volume, p. 351 reads: "An escape occurs when acts are done which are incompatible with custody, or when a relaxation of confinement is permitted so that the prisoner is not at all times in the control of the sheriff or keeper.* * "

Wharton's Criminal Law, Vol. 2, Sec. 2025, p. 2337, says:

"A distinction is taken by the old writers between breach of prison and escape. To breach of prison some force is necessary; some breaking of the continuity of the prison, some tearing away from custody. But if this element be not present, e.g., if the doors be left open and the prisoner walk out without interruption, the indictment must be for an escape, and is under no circumstances more than a misdemeanor. Nor is a confinement within prison walls an essential condition of the offense. A prisoner's voluntary departure from bounds out of prison assigned him by the jailer is a 'voluntary escape.' He is under arrest if he is ordered to be subject to arrest."

A prisoner in jail given liberty of the jail yard is comparable to a convict sentenced to confinement in the penitentiary and being out of the penitentiary on a prison farm or at a prison sawmill. The fact that he is in custody outside of the penitentiary proper does not change or alter his legal status, and if he leaves without legal authority this constitutes an escape.

In this instance the fact that the prisoner was confined in jail and given liberty by the sheriff of going into the jail yard to play with the sheriff's children does not relieve the prisoner from the legal liability attached and imposed upon such prisoner who is legally confined in jail on conviction of a criminal offense. If such person has not been discharged from the jail sentence in due course of law, he is guilty of escape if he leaves the premises without legal authority.

CONCLUSION

Therefore, it is the conclusion of this department that a prisoner legally confined in the county jail on a criminal charge who, while out in the jail yard with permission of the sheriff or jailer, leaves without authority, but later is apprehended and returned to the jail, is guilty of an escape from jail under Section 4309, R. S. Mo. 1939.

Respectfully submitted,

APPROVED:

GORDON P. WEIR Assistant Attorney General

J. F. TAYLOR Attorney General

inty Court may issue a duplicate warrant when original has been lost or destroyed before being pre-COUNTY WARRANT .: sented for payment, and county treasurer shall pay : said duplicate. 11/21/49 November 23, 1949 Hon. Robert P. C. Wilson, III, Prosecuting Attorney Platte County, Platte City, Missouri. Dear Mr. Wilson: This will acknowledge receipt of your request for an opinion which reads as follows: "I would like your opinion as to proper proceedure to be followed by County Treasurer in issuing duplicate warrant where original has been lost or destroyed before being presented for payment." Your attention is directed to the following statutes which provide for the payment of expenses incurred by the county, and the duties of the county treasurer in regard thereto. Sec. 13798, R. S. Mo.: "He (county treasurer) shall receive all moneys payable into the county treasury, and disburse the same on warrants drawn by order of the county court." Sec. 13801, R. S. Mo.: "He shall procure and keep a well-bound book, in which he shall make an entry of all warrants presented to him for payment, which shall have been legally drawn for money by the county court of the county of which he is the treasurer stating correctly the date, amount, number, in whose favor drawn, by whom presented, and the date the same was presented; and all warrants so presented shall be paid out of the funds mentioned in such warrants, and in the order in which they shall be presented: * * * " Sec. 13805, R. S. Mo.: "The county treasurer shall keep a just account of all moneys received and disbursed, and regular abstracts of all warrants and scrips drawn on the treasury, and paid or received by him, and shall cancel the same by writing in ink 'paid' across the face thereof, when paid or received."

Sec. 13825, R. S. Mo.:

"When a demand against a county is presented to the county court, the usual form of entry may be exemplified thus:

A B v. county. The account of A B for the sum of dollars being presented and inquired into, it is found by the court that the sum of dollars is due him from the county, payable out of (express the particular fund, as the case may require), and for which the clerk is ordered to issue a warrant.

When the court shall ascertain any sum of money to be due from the county, they shall order their clerk to issue a warrant therefor in the following form:

Treasurer of the county of ____, pay to _____ dollars out of any money in the treasury appropriated for (express the particular fund, as the case may require).

Given at the courthouse, this _____day of _____,
19___, By order of the county court.

Attest: C D, clerk

A B, president."

Sec. 13832, R. S. Mo.:

"Every such war rant shall be drawn for the whole amount ascertained to be due to the person entitled to the same, and but one warrant shall be drawn for the amount allowed to any person at one time, and shall be written or printed in Roman letters, without ornament. It shall be signed by the president of the court whilst the court is in session, attested by the clerk, and warrants shall be numbered progressively throughout each year: Provided, that where the claim allowed is for more than twenty-five dollars, the claimant may, on his own motion, in open court, have as many warrants issued for separate parts of such claim as he may desire, the whole amount of said warrants not to exceed the amount of the claim allowed, upon his paying the costs of the additional warrants."

Sec. 13824, R. S. Mo.:

"The county court shall have power to audit, adjust and settle all accounts to which the county shall be a party; to order the payment out of the county treasury of any sum of money found due by the county on such accounts.* * ."

It is the opinion of this office that a county treasurer would not be authorized to issue a duplicate warrant where original has been lost or destroyed, but that the county court would be authorized to issue such a duplicate warrant under R. S. Mo. 13824, cited above.

It is suggested by this office that whenever a warrant of the county court has been lost or destroyed, after written notice of loss of original shall have been filed before them, and satisfactory proof of such loss or destruction has been made to the county court, and the county treasurer certifies that such warrant has not been presented to him for payment, then the county court may issue a duplicate of such warrant, of like number, date, and amount, and insert thereon "Duplicate - Original Unpaid," and immediately notify the county treasurer of the issue of such duplicate, and the treasurer shall pay said duplicate, but not the original, whenever presented for payment.

CONCLUSION.

County Court may issue a duplicate warrant when original has been lost or destroyed before being presented for payment, and county treasurer shall pay said duplicate.

Respectfully submitted,

JOHN E. MILLS Assistant Attorney General

APPROVED:

J. E. TAYLOR

Attorney General/

JEM/LD

AGISTRATES - \$5.00 fee not refunded when no summons is issued and cause dismissed by plaintiff.

December 31, 1949

FILED 97 1/12/50

Honorable S. F. Wier Judge of Probate Court Atchison County Rock Port, Missouri

Dear Sir:

We have received your request for an opinion of this department, which request is as follows:

"This office respectfully requests an opinion from the Office of the Attorney General upon the following matter:

"An Attorney-at-law entered the office of the Magistrate Court and filed with the Clerk a Petition in a civil action, together with the Five (\$5.00) Dollar filing fee. Upon his entrance he asked the whereabouts of the Sheriff, stating that he would like to have service as soon as possible as he understood that the Defendant in the action was about to remove from the community.

"The Clerk filed the original Petition and receipted for the filing fee setting the case on the 27th day of December, 1949. The attorney for the Plaintiff requested that we obtain service, but set the hearing for a later date as he was to be out of the community over the holidays. The hearing date was therefor moved up to the 3rd day of January, 1950, and the Clerk inquired if the Attorney had a copy of the petition, that it would be a courtesy to attach a copy to the Summons. The attorney for the Plaintiff wasn't sure, but stated that he would look in his file at his office.

Honorable S. F. Wier

"Due to more pressing matters the Summons was not issued at that moment. Approximately two and one-half hours later the Attorney for the Plaintiff telephoned the Magistrate's Office and asked that the suit be dismissed as the Defendant had come to his office and paid the amount sued for. This attorney further requested the return of the Five (\$5.00) Dollar filing fee to himself.

"This office is not sure that it is within its rights to refund a filing fee to the Plaintiff under these circumstances.

"What constitutes filing a suit in the Magistrate Court? When, if ever, would the filing fee be remitted to the Plaintiff?"

Section 23 of the Magistrate Court Law, Laws of Missouri, 1945, page 765, provides in part:

"Upon the commencement of any proceedings in the magistrate court the party commencing the same shall pay to the clerk of said court a fee of five dollars (\$5.00).

Section 15 of said act provides:

"Suits may be instituted before a magistrate, either by the voluntary appearance
and agreement of the parties or by process;
and the process for the institution of a
suit before a magistrate shall be either
a summons or an attachment against the
property of the defendant; if by agreement, the action is deemed commenced
at the time of filing the case; if by
process, upon delivery of the writ to
the sheriff to be served; and he shall
note thereon the time of receiving the
same."

Section 19 of said act provides in part as follows:

"Magistrate courts shall be courts of

record. No formal pleadings upon the part of either plaintiff or defendant shall be required in magistrate courts, but before any process shall issue in any such suit, the plaintiff shall file with the clerk of the magistrate court the instrument sued on, or a statement of the account, or of the facts constituting the claim upon which the suit is founded, * * *"

When the language of Section 23 is considered in the light of Section 15, it would appear that no liability to pay the five dollars (\$5.00) magistrate fee arises until the delivery of the summons to the sheriff. However, we feel that in Section 23, the Legislature did not use the phrase, "commencement of any proceedings," in the sense that such commencement is defined by Section 15. The time of commencement of the proceedings referred to in Section 15 is the time so far as the defendant is concerned. Insofar as the plaintiff and his liability to pay the magistrate fee is concerned, we feel that the commencement of the proceedings within the meaning of Section 23 is the time of institution of the proceedings by filing either a complaint or the statement of account or instrument sued on in the magistrate court. Such filing is accomplished upon delivery of the petition or instrument to the clerk of the court.

That the time of commencement of an action may vary as to the parties thereto, was pointed out in the case of United States v. American Lumber Company, et al., 80 Fed. 309. In the opinion in that case the court said, 80 Fed. 315:

"* * * While, commonly speaking, an action is said to be 'commenced' or 'brought' when the complaint is filed, still the general rule in the United States, except where it has been otherwise provided by statute, is that the action is deemed, in law, to be brought, so far as the defendant is concerned, from the time the summons or other process is issued and delivered, or put in course of delivery, to the officer, with a bona fide intent to have the same served. * * *

Honorable S. F. Wier

"But, where this general rule has not been changed by statutory enactment, the action, while it may be deemed 'commenced' or 'brought' so far as the plaintiff is concerned, when the complaint is filed, is not considered 'commenced' or 'brought' so far as the defendant is concerned, so as to stop the running of a statute of limitations, until legal steps have been taken to make him a party by suing out the appropriate process and making a bona fide effort to serve the same. * * *"

(Underscoring ours.)

We feel that the proper view to be taken of Section 23 is that the proceeding is 'commenced' so as to render the plaintiff liable for payment of the five dollars (\$5.00) magistrate fee upon filing of the complaint, statement of account or instrument sued upon. Such being our view of the matter, there would be no refund of the fee once the complaint or statement of account or instrument sued on has been filed by the clerk of the court.

CONCLUSION

Therefore, this department is of the opinion that the five dollars (\$5.00) magistrate fee required by Section 23 of the Magistrate Court Law, Laws of Misscuri, 1945, page 765, to be paid "upon the commencement of any proceedings in the magistrate court" is payable upon the filing of the complaint, statement of account or instrument sued upon, and the plaintiff is not entitled to a refund of said fee after such filing, although no summons is issued in the matter, and the cause dismissed by the Plaintiff.

Respectfully submitted.

APPROVED:

ROBERT R. WELBORN Assistant Attorney General

J. E. TAYLOR

Attorney General

RRW/feh